Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-294

SAMAEIT WESTBULK and JOHAN HAGENES,

Petitioners,

—against—

CARIBE SHIPPING CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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CARIBE SHIPPING CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners seek a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit, dated April 14, 1975, and its order, entered May 29, 1975, denying petitioners' application for rehearing, insofar as they affirm the judgment of the United States District Court for the District of Puerto Rico denying petitioners' motion for judgment, notwithstanding the jury verdict, on the issue of indemnity.

Citations to Opinions Below

The opinion of the Court of Appeals is reported at 514 F. 2d 1214 (1 Cir., 1975). The opinion of the District

Court is reported at 385 F. Supp. 119 (D.C.P.R., 1974). A petition for rehearing was denied May 29, 1975. They are reprinted in the appendix hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 19.1(b) of the Rules of the Supreme Court.

Question Presented

Where a jury has found a shipowner liable to a longshoreman for personal injury damages, must not his employer indemnify the shipowner, under the General Maritime Law, where the jury further finds that the longshoreman-plaintiff has been contributorily negligent?

(a) Must such contributory negligence be within the scope of the longshoreman's employment in order to be imputed to his employer on the issue of indemnity?

(b) If so, should not the burden be placed on the employer, as warrantor of its services, to show that its employee's negligent conduct occurred outside the scope of his employment in order to avoid ultimate liability for the consequences thereof?

Statement of the Case

This action was brought in the United States District Court for the District of Puerto Rico to recover damages for the death of Alejandro Cerich Ramos, a longshoreman, which occurred aboard the m/s Westbulk, a Norwegian flag vessel owned by petitioner, Samaeit Westbulk. Petitioners in turn, impleaded decedent's employer, Caribe Shipping Company, Inc., an independent stevedoring con-

tractor, seeking indemnity based upon the latter's breach of warranty of workmanlike performance.

At the conclusion of the trial, the jury returned a verdict in plaintiffs' favor in the sum of $100,800, finding petitioner negligent and the vessel unseaworthy. The jury further found that decedent had been contributorily negligent but, under the charge as given, denied petitioners' claim for indemnity against respondent, the contract stevedore. In submitting the issue of indemnity to the jury, the trial judge refused to charge, as requested by petitioners' counsel, that (A) decedent's contributory negligence was binding on respondent as a matter of law and constituted a breach of the latter's warranty of workmanlike performance or (B) decedent's contributory negligence was a factor to be considered in determining whether respondent had breached such warranty.

In response to petitioners' post-trial motion addressed to this point, the District Court stated that its refusal to charge either theory was justified in the absence of an affirmative showing by petitioners that decedent's contributory negligence had occurred while he was acting within the scope of his employment.

In affirming, the Court of Appeals for the First Circuit acknowledged "[t]hat a stevedore's warranty of workmanlike performance encompasses a promise to provide longshoremen free of negligence", yet affirmed the District Court's holding that "the allegedly negligent conduct [of decedent] must be in the course of his employment." (Bracketed material added) 514 F. 2d at 1217. Despite the fact that the only reasonable basis for a finding of contributory negligence supported by the record and urged at the trial was conduct on the part of decedent within the scope of his employment, petitioner was denied its

constitutional right under the Seventh Amendment to have the issue posed to the jury under either theory—i.e., that respondent was liable in indemnity, as a matter of law, for the negligence of its employee or that such negligence was a factor to be taken into consideration in determining that issue.

The Facts

Decedent, a longshoreman employed by respondent, reported for work aboard petitioners' m/s Westbulk at San Juan, Puerto Rico, on November 9, 1970. He and others discharged automobiles from hatch No. 2 throughout the morning. During the afternoon, it began to rain and work was suspended. While many of the longshoremen left the hatches, some, including decedent, remained and sought shelter in the automobiles still awaiting discharge. When the rain persisted, a whistle was blown by the stevedore signalling all longshoremen to leave the vessel. Apparently unnoticed by anyone, decedent failed to leave the vessel with the others and, thereafter, crewmembers of the m/s Westbulk covered the cargo hatches on the weather deck.

No further evidence was introduced as to decedent's subsequent activities until the following morning when his body was found on the tanktops in the No. 2 lower hold. This, essentially, is the narrative of facts contained in the Court of Appeals' opinion and as to which there is no serious dispute. On the basis of these facts and the testimony of maritime experts, the jury found that the m/s Westbulk was unseaworthy, her owner negligent and decedent contributorily negligent. In the absence of *any* charge concerning the effect of decedent's contributory negligence on the issue of indemnity, the jury denied the shipowner's claim against the stevedore.

The judgment in favor of plaintiffs has been satisfied by petitioners and only ultimate liability remains at issue.

Reasons for Granting the Writ

1. *Conflict with applicable decisions of this Court.*

In requiring an affirmative showing by petitioners that decedent's contributory negligence occurred while acting within the scope of his employment, the First Circuit has re-introduced a concept of tort law inapplicable under the General Maritime Law doctrine of warranty of workmanlike performance. In *Italia Società per Azioni* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964) the Court considered whether a maritime warrantor of workmanlike performance would be liable in indemnity for non-negligently supplying a piece of equipment, a latent defect in which caused injury to the warrantor's employee. In holding the warrantor liable in indemnity, the Court first discussed the considerations giving rise to a shipowner's obligation to provide a seaworthy vessel and its liability for failure to do so even in the absence of negligence. The Court then went on to state, 376 U.S. at 323:

> "They (such considerations) also serve to render a tort standard of negligence inapplicable to the stevedore's liability under its warranty of workmanlike performance." (parenthetical material added).

This was but a further clarification of a statement in *Ryan Stevedoring Co. Inc.* v. *Pan-Atlantic S.S. Co.*, 350 U.S. 124 (1956) describing the nature of the shipowner's indemnity suit as follows, 350 U.S. at 133:

> "It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of

the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service."

The courts below, in grafting the "scope of employment" qualification onto the shipowner's burden of proof, have ignored the clear admonition of both *Ryan* and *Italia*.

2. *Conflict among the Circuits.*

Following formulation of the maritime doctrine of a warranty of workmanlike performance running from a contract stevedore to a shipowner in *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the Court of Appeals for the Second Circuit has consistently imputed the contributory negligence of a longshoreman-plaintiff to his employer, the contract stevedore, in determining the issue of indemnity. First recognized in *Damanti* v. *A/S Inger*, 314 F. 2d 395 (2 Cir., 1963), this principle was reasserted in *Shenker* v. *United States*, 322 F. 2d 622 (2 Cir., 1963), and again in *Nicroli* v. *Den Norske Afrika et al.*, 332 F. 2d 651 (2 Cir., 1964). Ultimately, its application became crystalized in *Mortensen* v. *A/S Glittre*, 348 F. 2d 383 (2 Cir., 1965), where the trial judge directed a verdict in favor of the shipowner and against the employer-contractor, after the jury had first found plaintiff contributorily negligent. In affirming the Court of Appeals stated, 348 F. 2d at 385:

> "Mortensen's negligent conduct, which is imputed to his employer, was manifestly a breach of Federal's warranty of a workmanlike performance of the obligations of the contract."

The identical issue was again raised in *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F. 2d 1334 (2 Cir., 1969), cert. denied, 395 U.S. 946. There, the trial jury returned a special verdict that the vessel was unseaworthy, the shipowner negligent and plaintiff, himself, contributorily negligent. Based upon the last mentioned finding, the trial judge directed a verdict in favor of the vessel owner on its claim for indemnity against plaintiff's employer, the third party defendant. In affirming, the Court of Appeals first stated, 408 F. 2d at 1336:

> "The rationale of *Mortensen* was rather that the jury's finding of contributory negligence by the third party defendant's employee was conclusive of breach of the defendant's W.W.P. [warranty of workmanlike performance]."

There followed a discussion of this Court's holding in *Italia Societa per Azioni* v. *Oregon Stevedoring Co.*, *supra*, in human terms, 408 F. 2d at 1337:

> "We see no reason to suppose that the Italia doctrine applies only to material and not to human resources; indeed the Court's footnote reference to *Calderola* and *Orlando*, 376 U.S. at 321 n. 8, 84 S.Ct. 748, in support of a statement concerning equipment would not have been pertinent unless the Court considered that personnel should be treated on the same basis as rope. Putting the Italia criteria in human terms, while Golten did not warrant a perfect rigger, it did warrant one who would not in fact be negligent."

The *Mortensen, McLaughlin* precedents were adhered to in *Hartnett* v. *Reiss Steamship Company*, 421 F. 2d 1011 (2 Cir., 1970) cert. denied, 400 U.S. 852 and, most recently, in *King* v. *Deutsche Dampfs-Ges*, —— F. 2d —— (2 Cir.,

August 8, 1975). In its *King* opinion, a copy of which is included in the appendix, the Court concludes with the following succinct statement of the rule:

> "The warranty of workmanlike performance includes the furnishing of personnel who will not injure themselves."

Joining the Second Circuit on this issue are the Courts of Appeals for the Fourth Circuit, *United States Lines, Inc.* v. *Jarka Corp. of Baltimore*, 444 F. 2d 26, 28-29 (4 Cir., 1971); *Chinese Maritime Trust, Ltd.* v. *Carolina Shipping Co.*, 456 F. 2d 192 (4 Cir., 1972) and the Ninth Circuit, *Arista Cia. de Vapores S.A.* v. *Howard Terminal*, 372 F. 2d 152, 154 (9 Cir., 1967).

The Fifth Circuit, one judge dissenting, has taken the position that the contributory negligence of the plaintiff is a factor to be taken into consideration in determining whether the contractor has breached its warranty of workmanlike performance, *Julian* v. *Mitsui O.S.K. Lines, Ltd.*, 479 F. 2d 432 (5 Cir., 1973).

The Seventh Circuit has noted the existence of the conflict but, as yet, has found it unnecessary to choose between the *per se* rule followed in the Second, Fourth and Ninth Circuits or the "factor" approach of the Fifth, *Grayson* v. *Cordial Shipping Co.*, 496 F. 2d 710, 716 (7 Cir., 1974).

When the appeal in this case was first determined, the Third Circuit, too, stated that it did not reach the question of which approach to adopt since the jury had not been requested to specify whether decedent's contributory negligence had occurred in the course of his employment, 514 F. 2d at 1218. In denying petitioners' application for rehearing, the Court below appeared to favor the *per se* approach and, on the same day, so held in *R.S. Martinez* v.

Compagnie Generale Transatlantique, —— F. 2d —— (1 Cir., May 29, 1975), a copy of which is included in the appendix. Again, however, the Court of Appeals insisted that the contributory negligence of the longshoreman-plaintiff be within the scope of his employment in order to be imputed to his employer.

Thus, the existing conflict among the Circuits has been compounded for, while in most reported cases* touching on the issue the contributory negligence of the plaintiff may have occurred within the scope of his employment, it cannot be said that any but the First Circuit has made this a condition precedent to the imputation of such negligence to his employer.

Furthermore, the special questions submitted to the jury in cases such as *McLaughlin* and *King, supra,* which elicited affirmative answers on the question of contributory negligence, were no more restrictive in scope than those submitted by the trial judge in the instant case. Accordingly, petitioners respectfully submit that, not only is the First Circuit holding on the issue unduly restrictive but, also, it was fundamental error for the trial judge to refuse to charge either the *per se* or "factor" test, as requested, and *later* rationalize that shipowner's counsel had failed to properly restrict his requests according to a "scope of employment" test not previously recognized in any jurisdiction. The resulting prejudice is further highlighted by the fact that petitioners' trial counsel, in summation to the

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* A notable exception appears in *Rodriguez* v. *Olaf Pedersen's Rederi A/S*, 387 F. Supp. 754 (E.D.N.Y., 1974) (appeal pending) where the district court, in granting the shipowner judgment as a matter of law against the employer of a contributorily negligent longshoreman, stated, 387 F. Supp. at 760: "Rodriguez did not enter hatch #2 in order to perform any assigned task. Pedersen had no reason to expect longshoremen to be in that hold, since the stevedore's work there had been completed."

jury, contended that decedent was contributorily negligent only in failing to leave the hatch when his fellow workers did—a negligent act unquestionably within the scope of decedent's employment.

Petitioners urge that, under a theory of warranty as opposed to negligence, there should be no requirement that a longshoreman's contributory negligence be affirmatively shown to have occurred within the scope of his employment before it will be imputed to his employer, the warrantor of its services. Certainly, no such limitation inures to the benefit of a shipowner sued for breach of warranty of seaworthiness by a crewmember who has been assaulted by a fellow seaman acting outside the scope of his employment, *Boudoin* v. *Lykes Bros. S.S. Co., Inc.*, 348 U.S. 336 (1955), *Clevenger* v. *Star Fish and Oyster Company*, 325 F. 2d 397 (5 Cir., 1963), *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515 (2 Cir., 1952). As the Court has previously approved language indicating that the two warranties are corrolaries and, presumably, coextensive, *Italia Societa per Azioni* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 323, n. 10, it is difficult to justify the restriction imposed by the courts below on the liability of respondent under its warranty of workmanlike performance. Since the shipowner's warranty encompasses personnel as well as equipment, *Waldron* v. *Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967), so should that of the stevedore.

If the stevedore's warranty includes a promise to provide longshoremen who will not, in fact, be negligent, *McLaughlin, supra,* it would appear axiomatic that the same warranty would include a promise to provide longshoremen who will not, in fact, act outside the scope of their employment. See *Smith* v. *Lauritzen*, 201 F. Supp. 663 (E.D. Pa., 1962).

Even assuming, *arguendo,* justification for such restriction, the burden should be placed upon the warrantor to show that the negligent act of its employee occurred outside the scope of his employment in order to escape liability, *Ware* v. *Cia de Navegacion Andes, S.A.*, 180 F. Supp. 939 (E.D. Va., 1960), *Cas* v. *Kilkerson*, 199 F. 2d 398 (Dist. Col. Cir., 1952). See also, *Porto Rico Gas & Coke Co.* v. *Frank Rullan & Associates*, 189 F. 2d 397 (1 Cir., 1951), *Ira S. Bushey & Sons, Inc.* v. *United States*, 389 F. 2d 167 (2 Cir., 1968).

Petitioners respectfully submit that the issue herein presented will be one of continuing vitality in jurisdictions such as Puerto Rico where the rights of longshoremen are generally governed by the Puerto Rico Workmen's Compensation Act and not by the Longshoremen's and Harbor Workers' Compensation Act, as recently amended. *Alcoa Steamship Company* v. *Perez Rodriguez*, 376 F. 2d 35 (1 Cir., 1967); see also, footnote 1 of the Court of Appeals' opinion in the instant case. As to a choice among the options presented, petitioners contend that the *per se* approach is eminently sound. A re-reading of *McLaughlin, supra,* reveals that the choice was carefully considered by the Second Circuit where the Court stated, 408 F. 2d at 1336:

> "The similarity in name between negligence and contributory negligence masks an essential difference in concept. Whereas negligence is a breach of a duty to others and gives rise to a right in the person injured, contributory negligence is simply a disability preventing a plaintiff from recovering. See Restatement of Torts 2nd §463 (1965); 2 Harper & James, Torts §22.10 (1956); Prosser, Torts §64 (2 ed. 1964). A rule whereby the employee's disability automatically creates a right in the shipowner to be indemnified by the em-

ployer can thus be sound only if the employer is deemed to have undertaken not simply to use reasonable care to select, train and supervise employees so that they will protect themselves, but to furnish employees who in fact will not negligently expose themselves to injury. If the warranty were only of the more limited sort, the contributory negligence of an employee, although some evidence of breach, would not alone support a verdict in favor of the indemnitee, let alone the direction of one.

We think, however, that under Italia Societa per Azioni v. Oregon Stevedoring Co., 376 U.S. 315, 84 S. Ct. 748, 11 L.Ed. 2nd 732 (1964), the WWP is not so limited."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari be granted.

August 25, 1975

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APPENDIX

Opinion and Order of United States District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

CIVIL No. 401-71

CARMEN CARILLO VDA. DE CERICH, for herself and on behalf of the infant MARIA DEL CARMEN ESCAPA JAMES (CERICH),

Plaintiffs,

VS.

SAMAEIT WESTBULK and JOHAN HAGENES,

Defendants and Third Party Plaintiffs,

VS.

CARIBE SHIPPING COMPANY, INC.,

Third Party Defendant.

OPINION AND ORDER

After a jury trial, verdicts were rendered in favor of the widow in the amount of $78,300.00, and on behalf of the decedent's adopted daughter, in the amount of $22,500.00. The jury also found in favor of the third party defendant on the indemnity claim. The defendants have filed post-trial motions for judgment notwithstanding the verdicts on both the main action and on the third party complaint. In the alternative, the defendants have moved for a new trial in both the case they were defending and in the case they were prosecuting as third party plaintiffs. The plaintiffs

have opposed the motions directed against them and have moved for the imposition of prejudgment interest under both the law of Puerto Rico and the general admiralty law. The third party defendant has also opposed the motions against it and has moved for attorney's fees to be awarded to it for the third party plaintiffs' obstinacy.

The post trial motions have been thoroughly briefed and the Court, after due deliberation, makes the following dispositions:

THE EVIDENCE

The decedent, a longshoreman, was employed by the stevedoring contractor on November 9, 1970, to work aboard the shipowner's vessel. The ship was loaded with automobiles. The decedent had been working since seven o'clock in the morning, when at 2:30 p.m. work was stopped because of rain. The longshoremen were on stand-by which meant, according to the testimony, that they could go to the midship house or stay anywhere aboard the vessel where they would be out of the rain. The decedent elected to get inside one of the automobiles. According to the defendants' and plaintiffs' witnesses, this was not an uncommon practice. Shortly before the end of the shift at 4:00 p.m., a signal was blown to end work. The longshoremen, except for the plaintiffs' decedent, left the vessel and the crew closed the hatches with automatic gear. No evidence was offered to show that the seamen inspected the hatch before closing it. There was neither light nor ventilation in the hold once the hatch covers were shut.

The following morning an inspection of the hold was made prior to the vessel's departure and the decedent's body was found near the ladder at the bottom of the hold

some four or five levels below the tweendeck where he had been working and where he had last been seen about one-half hour prior to the whistle. There was no direct ladder from the tweendecks to the ladder. To reach the ladder from a tweendeck one had to step on a cleat in the escape hatch and then grab the ladder. The space between the tweendecks, which were completely removable, and the cleat was estimated at 2½ to 3 feet and slightly off level. There was evidence that the skull fractures that resulted in death were caused when the decedent fell down the escape hatch, striking his head on the next lower tweendeck.

Experts were called by all sides as to the duty of inspection prior to closing of the hatches. There was ample evidence to show that inspections should always be made prior to the closing of hatches to safeguard the vessel, to protect the cargo or to ascertain that no longshoremen are left below, either ill, asleep (which the defendants expert said was not uncommon after a standby), or as stowaways. The defendants were thus caught on the horns of a dilemma. If no inspection were conducted they were negligent and if one were conducted even cursorily, the decedent should have been discovered. There was a concession that a vessel's unlighted and unventilated hold is an unseaworthy condition.

expectancy of 10.5 years and a life expectancy of 20.5

The decedent had a working expectancy of 10.5 years and a life expectancy of 20.5 years. Because conscious pain and suffering prior to death would, under the circumstances outlined above, have entailed a considerable amount of speculation, plaintiffs were not permitted to prove such item of damage.

Vis-a-vis the plaintiffs, defendants contend that the decedent was not entitled, under the circumstances de-

scribed to the warranty of seaworthiness, and that the duty to inspect the hold was only to prevent damage to the vessel or the cargo. They argue that since the duty did not extend to the longshoremen, they could not have been negligent with respect to Alejandro Cerich, the decedent.

UNSEAWORTHINESS AND NEGLIGENCE

Analogizing from the decision of *Victory Carriers, Inc.* v. *Law*, 404 U. S. 202, 92 S. Ct. 418, 30 L. Ed. 2d 383 (1971), the defendants contend that whatever duty they may have owed the decedent to supply and maintain a seaworthy vessel, that duty ceased the moment the discharging operations were concluded for the day. The analogy is inapposite. In *Law*, the issue was whether there was maritime jurisdiction for shore-side accidents, unassociated with ship's gear merely because the longshoreman was engaged in loading or unloading. The Supreme Court held there was none but it did not dilute the holdings of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946) nor of *Gutierrez* v. *Waterman SS Corp.*, 373 U. S. 206. 83 S. Ct. 1185, 10 L. Ed. 2d 297 (1963). Mr. Justice White, speaking for the majority said in *Victory Carriers, Inc.* v. *Law*, supra, at 404 U. S., pp. 210-211, 92 S. Ct. at p. 424:

> "The decision in Gutierrez turned, not on the 'function' the stevedore was performing at the time of his injury, but, rather, upon the fact that his injury was caused by an appurtenance of a ship, the defective cargo containers, which the Court held to be an 'injury to person . . . caused by a vessel on navigable waters' which was consummated ashore under 46 U. S. C., Section 740."

Under the *Sieracki* doctrine, the longshoreman boards the vessel with the same rights of a seaman. He does not suddenly lose those rights if he stays aboard the vessel one minute beyond quitting time. As long as a longshoreman is aboard a vessel at the invitation of the owner, performing services traditionally performed by seamen, and as long as the longshoreman does no act inimical to the relationship, he is entitled to a seaworthy vessel, appliances, gear and crew. A humanitarian doctrine adopted for the protection of life and limb cannot be so abruptly terminated by the niceties of contractual concepts.

The defendants' stevedoring expert conceded that the hold was unseaworthy the moment it was closed—at least insofar as a human being trapped below. The pendulum of rights and duties may swing in a fluid society depending upon the exigencies created by the societal condition. But the defendants have miscalculated the sweep of the arc. Humanitarian rights of workmen are not so easily dissolved.

The defendants' argument that they only owed a duty to inspect the cargo and therefore could not be negligent in failing to inspect for men is based upon foundations equally as flimsy. The defendants state their argument thusly: "A plaintiff who bases his action on the breach of a duty must be within the class of persons to whom the duty is owed. No action may be found upon a duty only to others". Professor Prosser is cited for this proposition but the statement is lifted from the text out of context. Professor Prosser is commenting upon the language adopted by various courts and explains that the word "duty" should never have been used in describing negligence. He says:

> "In other words, 'duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases the duty is always the same, to conform to a legal standard of reasonable conduct in the light of the apparent risk."

Later, in the same chapter, he makes the following comment:

> "It is therefore not surprising to find that the problem of duty is as broad as the whole law of negligence, and that no universal test for it has ever been formulated. It is a short hand statement of a conclusion, rather than an aid to an analysis in itself."

There was conflicting testimony on the issue of whose duty it was to inspect the hold prior to the closing of the hatch. One of defendants' experts contended that the stevedore should have checked to see that all the men were out of the hold, and that the mates had to inspect only the cargo. Then the defendants produced a witness to prove that the absence of a notation of inspection in the ship's log did not mean that an inspection had not taken place. Thus, the jury could infer that defendants recognized their duty, inspected and conducted an unreasonably poor or negligent inspection. Or, the jury could infer that the defendants did, indeed, have the duty to inspect and negligently failed to do so. As for the contention that their "duty" only was to inspect the cargo and not for men, that is the question of foreseeability. Was there a likelihood that men might still be in the hold? The defendants' witnesses conceded as much. With this knowledge, any failure

to inspect constituted negligence. See: Reinstatement of the Law Second, Torts 2d, Section 281, Comments g and j.

COMPARATIVE NEGLIGENCE

The jury was presented with a special verdict form on only one issue—comparative negligence. This singling out of one issue in a case where several issues are to be tried may precondition the jury to make such a finding. The special verdict form was requested by the shipowner and no objections were lodged. Perhaps dutifully, the jury returned a verdict finding the plaintiffs' decedent 10% comparatively negligent and reduced the verdicts in the appropriate amounts. Neither plaintiffs nor third party defendants have challenged the finding, and, indeed, there was evidence to substantiate the verdict. The defendants, however, contend that this finding entitled them to a judgment notwithstanding the verdict on his third party complaint. They assert, that as a matter of law, if a jury finds comparative negligence on the part of an injured longshoreman, the shipowner must be indemnified in toto by the longshoreman's employer. There is a great body of case law to support this proposition mostly from the Court of Appeals for the Second Circuit and the shipowner has exhaustively catalogued the cases.[1] The stevedoring contractor has just as assiduously catalogued a set of cases

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[1] *Mortensen* v. *A/S Glittre* (2 Cir. 1965), 348 F. 2d 383; *McLaughlin* v. *Trelleborgs Angfartygs* (2 Cir. 1969), 408 F.2d 1334; *Hartnett* v. *Reiss Steamship Company* (2 Cir. 1970), 421 F. 2d 1011; *Damati* v. *A/S Inger* (2 Cir. 1963), 314 F.2d 395; *Shenker* v. *United States* (2 Cir. 1963), 322 F. 2d 622; *Nicroli* v. *Den Norshe Afrika* (2 Cir. 1964), 332 F. 2d 651; *United States Lines* v. *Jarka Corporation* (4 Cir. 1971), 444 F. 2d 26; *Chinese Maritime Trust Limited* v. *Carolina Shipping Co.* (4 Cir. 1972), 456 F. 2d 192.

mostly from the Court of Appeals for the Fifth Circuit[2] alleging that the proper rule is that the comparative negligence of the injured longshoreman is a factor that may be taken into account in determining whether the stevedore breached its duty of workmanlike performance.

The difficulty the Court faces is that in making its finding of comparative negligence, the jury was not asked to specify the conduct of the decedent that it considered negligent. No one knows why the decedent remained aboard. If he had gone exploring there would be no doubt that his conduct was negligent and that his employer had breached its duty of workmanlike performance. But suppose he had become ill or even fallen asleep, the Court would be hard pressed to uphold a finding of comparative negligence, in view of defendants' experts' testimony that both of these situations were common, especially the latter during standby time in the rain. If the decedent heard the whistle and did nothing else, his conduct would have been negligent. If he heard the whistle and attempted to leave and the crewmembers closing the hatch did not give him enough time, he might not have been negligent. If he never heard the whistle, he would be negligent or not negligent depending in part on whether he was awake, ill, or doing something he should not have been doing.

In all of the cases cited by the defendants, the comparative negligence of the injured workman was both a proxi-

[2] *Delaneuville* v. *Simonsen* (5 Cir. 1971), 437 F. 2d 597; *Humble Oil & Refining Company* v. *Philadelphia Ship Maintenance Co. Inc.* (3 Cir. 1971), 444 F. 2d 727; *Shaw* v. *Lauritzen* (3 Cir. 1970), 428 F. 2d 247; *Drewery* v. *Daspit Bros. Marine Divers, Inc.* (5 Cir. 1963), 317 F. 2d 425; *Lusich* v. *Bloomfield Steamship Company* (5 Cir. 1966), 355 F. 2d 770; *United States Lines Co.* v. *Williams* (5 Cir. 1966), 365 F. 2d 332; *D/S Ove Skov* v. *Hebert* (5 Cir. 1966), 365 F. 2d 341; *Jackson* v. *Trans World Marine Corporation* (S.D. Ga. 1969), 296 F. Supp. 1396.

mate cause of the accident and a factor of breach of the warranty of workmanlike performance. In this case the jury could easily have determined that the decedent's comparative negligence consisted of trying to escape from his entrapment. Despite the lack of ventilation, there was sufficient oxygen in the vast hold of this vessel. A cool, calm and collected longshoreman may have reasoned, once he found himself in the pitch black hold, that his best chance was to just stay put. Hunger and thirst could be endured for some time and sooner or later that hold had to be reopened. The Court is not saying that it would necessarily have found the decedent comparatively negligent for trying to get out of the hold, but that there was a likelihood that the jury may have done so.

If, in fact, this was the basis of the jury's finding, it does not follow that this negligence is imputable to the employer. The employer's warranty is to provide workmanlike service, not to supply a seaworthy vessel. After the hold was closed, the employer was providing no services. Even if one were to adopt the Second Circuit rationale, and this Court does not, under the facts of this case, find it necessary to adopt either rule as the exclusive and proper one, the stevedore warrants that its employee will be free from negligence in the performance of his work. The stevedore makes no warranty that a longshoreman will not be comparatively negligent in trying to extricate himself from a position of danger in which he was placed by the negligence of the crew and the inherent unseaworthiness of the vessel.

It was for this reason that the Court refused to instruct the jury as requested by defendants (Requests 32 and 33):

> "32. Contributory negligence of a longshoreman is imputable to a stevedore's employer and becomes actionable as a breach of the stevedore's warranty to

perform stevedoring work in a workmanlike and safe manner.

"33. If the accidental death of Alejandro Cerich resulted solely from the negligence of the shipowners, without fault on Cerich or Caribe Shipping's part, then the shipowner should not be indemnified. On the other hand, if Cerich was contributorily negligent, or his employer failed to act in a safe and workmanlike manner, then the liability must fall on his employer, Caribe Shipping Company."

As has been stated, the facts of this case made it impossible to instruct Request Number 32, unless the specific conduct of the longshoreman that the jury might find negligent were to be reported. The defendants proposed no such special findings in their verdict form apparently for tactical reasons. Request Number 33 was perfectly proper if the phrase "if Cerich were contributorily negligent" were removed, although it would have been redundant since the Court had amply covered all phases of the third party claim were covered in other instructions.

The issue on the third party claim boiled down to whose responsibility it was to check the hold prior to its being closed. There was evidence that could have supported either conclusion. The jury, as final arbiter, found in favor of the stevedoring contractor. Under a different factual context this Court might have concluded that their finding of comparative negligence on the part of Cerich would have required the granting of the motion for judgment notwithstanding the verdict. In this factual setting, however, and in the posture of the case when the parties presented it for resolution, the Court is convinced that no error has been committed. The verdict is not inconsistent.

DAMAGES

Defendants now claim that the jury awards are excessive because they include damages for loss of consortium, loss of society, grief and anguish, and according to their theory such damages are no longer recoverable since the decision in *Moragne* v. *States Marines Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d (1970). *Moragne* reestablished the common law action for wrongful death, occurring within the navigable waters of a state, but the question of compensable damages was left for a future date. The Court stated:

"If still other subsidiary issues should require resolution such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful death acts have been implemented with success for decades. The experience thus built up counsel that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill."

398 U.S. at 408, 90 S. Ct. at 1792.

The post-*Moragne* litigation has demonstrated that judges do not always agree upon the essentials that constitute the miller's art, nor even upon the materials that are to be ground in the mill. A wide variety of opinions have been issued wherein some elements of damages are included by different courts or by different panels of the same court.[3] The sifting process has reached its climax.

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[3] *Petition of United States Steel Company* (6 Cir. 1970), 436 F. 2d 1256; *Simpson* v. *Knutsen* (9 Cir. 1971), 444 F. 2d 523; *Greene* v. *Vantage Steamship Corp.* (4 Cir. 1972), 466 F. 2d 159;

however, with the recent decision of the Supreme Court in *Sea Land Services, Inc.* v. *Gaudet*, —— U.S. ——, —— S. Ct. ——, —— L. Ed. 2d ——, 42 L. W. 4168 (January 21, 1974). There, the Supreme Court reaffirmed that *Moragne* "created a true wrongful death remedy—founded upon the death itself and independent of any action the decedent may have had for its own personal injuries." The Court went on to hold that the *Moragne* remedy includes damages for "loss of support, services, and society, as well as funeral expenses." (42 L. W. at 4172). Mr. Justice Brennan writing for the majority included within the concept of "services", "the nurture, training, education and guidance that a child would have received had not the parent been wrongfully killed. Services the decedent performed at home or for his spouse are also compensable." (42 L.W. 4172—footnotes omitted.)

"Society", according to the Supreme Court, embraces "love, affection, care, attention, companionship, comfort and protection" (42 L.W. at 4172). It does not include mental anguish or grief. The distinction is adopted from the language of Speiser, Recovery for Wrongful Death, Section 3.45, p. 223.

Seizing upon this distinction, the defendants insist that at the very least a new trial on the issue of damages, or a remittitur is required. While conceding that loss of services and society are embraced within the *Moragne* type

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Dugas v. *National Aircraft Corp.* (3 Cir. 1971), 438 F. 2d 1386; *Spiller* v. *Thomas M. Lowe, Jr. and Associate Inc.* (8 Cir. 1972), 466 F. 2d 903; *Dennis* v. *Central Gulf Steamship Corp.* (5 Cir. 1972), 453 F. 2d 137; *Gaudet* v. *Sea Land Services, Inc.* (5 Cir. 1972), 463 F. 2d 1331; *Petition of Canal Barge Co.* (5 Cir. 1973), —— F. 2d ——, 1973 A.M.C. 843, 867-875; *Mascuilli* v. *United States* (S.D.N.Y. 1972), 343 F. Supp. 439; *In re Sincere Navigation Corp.* (E.D. La. 1971), 329 F. Supp. 652.

action, the grief and anguish of the widow is not and the jury was, they claim, improperly allowed to consider such damages. This was a jury trial and a fair reading of the complaint and the pretrial stipulation as well as the requested and unopposed instructions indicate that damages were sought under the law of Puerto Rico. The Supreme Court has stated in *Gaudet* that the *Moragne* type action may be coupled with a state survival statute and a jury may consider all items of damage. (42 L.W. at page 4173, n. 24.)

The defendants attempt to overcome this obstacle by alleging that this would permit a longshoreman or seaman killed in Puerto Rican waters to obtain a higher recovery than his stateside counterpart.[4] This, they allege, would not be compatible with the principle of uniformity that pervades the admiralty law.

In respect to maritime workers and their relation to federal maritime law, Puerto Rico is *sui generis*. The right to sue for maritime injuries or death which occur in the territorial waters of Puerto Rico does not have its genesis in the admiralty law even though in some instances the humanitarian principles of *Sieracki* v. *Seas Shipping Co.*, supra, and its progeny have been found to be compatible with Puerto Rican law. In other instances, Puerto Rican maritime workers have been denied any relief at all except the benefits provided by the local workmen's compensation statute.

A half century ago, it was held that the admiralty law did not apply at all in Puerto Rican waters. *Lastra* v. *New York and Porto Rico S.S. Co.*, (C.C.A. 1st, 1924), 2 F. 2d

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[4] Most states do not permit any recovery for grief or anguish. *Sea Land Services, Inc.* v. *Gaudet*, supra, 42 L.W. 4168 at p. 4172 n. 17.

812. Years later, this doctrine was overruled but with some reservations. In *Guerrido* v. *Alcoa Steamship Company* (1 Cir. 1956), 234 F. 2d 349, our Court of Appeals held that although Puerto Rico had power to legislate over its territorial waters in matter of local concern, it had not legislated maritime torts out of existence since there was nothing in the Puerto Rico Workmen's Accident Compensation Act, Title 11, Laws of Puerto Rico Annotated, Section 1, et seq. that prohibited third party suits, but in fact, they were specifically contemplated, Title 11, Laws of Puerto Rico Annotated, Section 32. That decision did not open the door to all federal rights legislated in favor of maritime workers. For example, the Jones Act, Title 46, United States Code, Section 688, which ostensibly applies to all American seamen,[5] has been held to be inapplicable to Puerto Rican seamen hired in Puerto Rico by Puerto Rican employers provided their injury occur within the navigable waters of Puerto Rico. *Fonseca* v. *Prann* (1 Cir. 1960), 282 F. 2d 153, cert. denied 365 U.S. 860, 81 S. Ct. 826, 5 L. Ed. 2d 822 (1961). Compare *Alcoa Steamship Company* v. *Velez* (1 Cir. 1967), 376 F. 2d 521, where it was held that the Puerto Rico Workmen's Accident Compensation Act cannot be applied to seamen injured in Puerto Rican waters on an American vessel owned by a corporation of a state other than Puerto Rico where the contract of employment was not entered into in Puerto Rico.

It has also been held that Puerto Rican longshoremen

[5] It also applies to many foreign seamen injured or killed on foreign vessels. *Hellenic Lines Limited* v. *Rhoditis*, 398 U. S. 306, 90 S. Ct. 1731, 26 L. Ed. 2d 252 (1970). Compare the difference in result between *Mpiliris* v. *Hellenic Lines, Limited* (S.D. Tex. 1969), 323 F. Supp. 865, affirmed 5 Cir. 1971, 440 F. 2d 1163, with our decision in *Mojica* v. *Puerto Rico Lighterage Co., Inc.* (D.P.R. 1972), 357 F. Supp. 339.

are not entitled to a seaworthy vessel if the vessel happens to be owned or demised by their employers. *Perez-Rodriguez* v. *Alcoa Steamship Company* (1 Cir. 1967), 376 F. 2d 35, cert. denied 389 U.S. 905, 88 S. Ct. 215, 19 L. Ed 219 (1967); *Torres Ramos* v. *Beauregard* (1 Cir. 1970), 423 F. 2d 916.[6]

The Puerto Rico maritime worker is able to bring a third party suit or is barred from suing his employer, if a seaman, as the case may be, only by virtue of the Puerto Rican Workmen's Compensation Act, Title 11, Laws of Puerto Rico Annotated, Section 1, et seq. Whereas no state may enact workmen's compensation affecting workers injured or killed on navigable waters, without offending the uniformity requirements of the admiralty and maritime law, *The Lottawanna*, 21 Wall. 558, 88 U.S. 558, 22 L. Ed. 654 (1847); *Southern Pacific* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917); *Knickerbocker Ace Co.* v. *Stewart*, 253 U.S. 149, 40 S. Ct. 438, 64 L. Ed. 834 (1920); *State of Washington* v. *Dawson & Co.*, 264 U.S. 219, 44 S. Ct. 302, 68 L. Ed. 646 (1924), Puerto Rico may enact such legislation with no offense to the Constitution because of its peculiar relationship with the United States by way of the Territorial Clause (Article IV, Section 3, Constitution of the United States) and the Federal Relations Act (c. 145, Section 7, 39 Stat. 954 (1917); c. 446, Section 4, 64 Stat. 319 (1950)). *Guerrido* v. *Alcoa Steamship Company*,

[6] The rule as to stateside longshoremen is just the opposite because the immunity afforded the employer by the Federal Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, Section 901, et seq. did not absolve the ship or its owner of its duty to comply with the seaworthiness warranty. *Reed* v. *The Yaka*, 373 U. S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448 (1963); *Jackson* v. *Lykes Bros. Steamship Co.*, 386 U. S. 731, 87 S. Ct. 1419, 18 L. Ed. 2d 488 (1967).

supra; *Fonseca* v. *Prann,* supra; *Alcoa Steamship Company* v. *Velez,* supra; *Torres Ramos* v. *Beauregard,* supra. However, such legislation has been held to be limited by the scope of Puerto Rico's legislative power so that it may not affect maritime workers employed outside of Puerto Rico or whose injuries occur outside of the territorial waters of Puerto Rico. *Alcoa Steamship Company* v. *Velez,* supra.

Thus we see that federal maritime rights of the blue water or *Sieracki* seaman in Puerto Rico all stem from what is permitted by the Puerto Rico Workmen's Accident Compensation Act, Title 11, Laws of Puerto Rico Annotated, Section 1, et seq., Title 11, Laws of Puerto Rico Annotated, Section 32. This Section, in turn, incorporates, insofar as third party actions are concerned, the rights and remedies provided by the Civil Code of Puerto Rico, Title 31, Laws of Puerto Rico Annotated, Section 5141.[7] Section 5141 has no counterpart in the Common Law. It is an all-encompassing tort statute that serves as the basis of recovery for all damage caused by negligence, intentional acts or violations of imposed obligations and which has been interpreted to include a wrongful death remedy and survival type actions.

Orta v. *Porto Rico Railway Light & Power Co.,* 1927, 36 P. R. R. 668; *Lopez* v. *American Railroad Co.,* 1936; *Vargas* v. *Alers,* 1948, 69 P. R. R. 215; *Travieso* v. *Del Toro,* 1953, 74 P. R. R. 940; *Correa* v. *P. R. Water Resources Authority,* 1961, 83 P. R. R. 139; *Cirino* v. *P. R. Water Resources Authority,* 1964, 91 P. R. R. 590; *Commercial Union Insurance*

[7] The entire text reads:

"A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done. Concurrent imprudence of the party aggrieved does not exempt from liability, but entails a reduction of the indemnity".

Co. v. *Gonzalez Rivera* (1 Cir. 1966), 358 F. 2d 480; *Santa* v. *United States,* (D.P.R. 1966), 252 F. Supp. 615.

In *Compañia Transatlantica Española, S.A.* v. *Melendez Torres* (1 Cir. 1966), 358 F. 2d 209, an action for wrongful death and a survival type action, it was held that Section 5141 was broad enough to encompass unseaworthiness through the breadth of the concept of "fault". The award of damages for grief and mental anguish were not disturbed by the Court of Appeals, even though there was a remand occasioned by the excessive award for the decedent's conscious pain and suffering prior to death. The admiralty law and its humanitarian policy is compatible and coextensive with the same policy that pervades the Civil Code. But if the admiralty law is more expansive in its remedies than those permitted by the Workmen's Accident Compensation Act of Puerto Rico, the latter governs. On the other hand, if said compensation act permits a greater recovery through the incorporation of the Civil Code provisions, it is the local wrongful death and survival act that controls. This creates no problem in uniformity and it is contemplated by the Gaudet decision that the "state" action may be joined with the *Moragne*-type suit.

The final contention of the defendants on the damage issues is that the award is excessive. In *Gaudet,* supra, Mr. Justice Brennan iterated his confidence in the jury system and the reasonableness of the judiciary by saying:

> We are confident that the measure of damages for loss of society in a maritime wrongful death action can 'be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation for the injuries

> inflicted.' *The City of Panama,* 101 U.S. 453, 464 (1879). As in all damage awards for tortious injury '[i]nsistance on mathematical precision would be illusory and the judge or juror must be allowed a fair latitude to make reasonable approximations guided by judgment and practical experience.' *Whitaker* v. *Blidberg Rothchild Co.,* 296 F. 2d 554, 555 (1961). Moreover, appellate tribunals have amply demonstrated their ability to control excessive awards, see, e.g. *Moore-McCormack Lines, Inc.* v. *Richardson,* 295 F. 2d 583 (1961); *Dugas* v. *National Aircraft Corp.*, 438 F. 2d 1386 (1971)." 42 L. W. at 4174.

In this Circuit the test imposed by the Court of Appeals in determining whether a jury award has been excessive has been variously phrased " 'monstruous', 'outrageously excessive' or 'shocking to the conscience of the court . . .' ", *United States* v. *Grigalauskas,* (1 Cir. 1952), 195 F. 2d 494, 498, or "unless it is so excessive that the district court's refusal to order a new trial constitutes a manifest abuse of discretion", *Gnapolsky* v. *Park Gardens Development Corp.* (1 Cir. 1971), 439 F. 2d 844, 846, or "palpably excessive", *Graunstein* v. *Massachusetts Bank & Trust Co.* (1 Cir. 1971), 443 F. 2d 1281. 1285. The evidence must be viewed most favorably to the plaintiffs, because the Court must be most reluctant to overturn a jury verdict, especially where the sums include unspecified compensation for pain and suffering. *Rivera* v. *A/B Nordstjernan* (1 Cir. 1972), 456 F. 2d 970, 974-975. Loss of services, loss of society, grief and anguish must, of necessity, fall within the same category.

After due deliberation, taking into consideration all of the evidence concerning loss of services, loss of society and

grief, and considering the role played by the decedent in this household, this Court finds that the verdicts are well within the realm of reasonableness and do not shock the conscience of the Court. Taking into account the depreciated value of the dollar, the working and life expectancy of the decedent, and all other factors, the award does not seem to this Court to be overly generous or even influenced by sympathy. The verdicts should not be disturbed.

OBSTINACY AND PREJUDGMENT INTEREST

This Court conducted the pretrial herein and called another conference immediately prior to the commencement of trial. For the nearly three years that this action was pending, there was never a concession of liability nor was there any settlement offer until just before the pretrial. That offer was, in the opinion of the Court, too low to be considered seriously by any conscientious plaintiff's attorney. From these conferences it was apparent that the defendants' principal issues were comparative negligence and indemnity. While the existence of comparative negligence may, in some situations, relieve a defendant from the consequences of a finding of obstinacy, here the matter was clearly negotiable. The fact that an indemnity claim may exist is no reason to compel a plaintiff to litigate endlessly just so that a defendant can utilize the plaintiff's preparation and expense. This Court has had occasion to deplore this practice several times in recent years. *Rivera* v. *A/S Nordstjernan* (1 Cir. 1972), 456 F. 2d 970; *Pizarro Felix* v. *Victory Carriers, Inc.* (D.P.R. 1972), 342 F. Supp. 1386; *De Thomas* v. *Delta S.S. Lines, Inc.* (D.P.R. 1973), 58 F. R. D. 335.

Whereas the defendants were not willing to settle with plaintiffs the third party defendant was willing to so do

on a contribution basis. The shipowner was only willing to have the stevedore defend in its stead. From the overwhelming evidence of unseaworthiness and negligence of the shipowner, this Court finds that the defendants were obstinate. Title 32, Laws of Puerto Rico Annotated, App. II, Rule 44.4 (d); *Soto* v. *Lugo,* 1954, 76 P. R. R. 416; *Rivera* v. *A/S Nordstjernan,* supra.

Taking into account the various factors enunciated in *Heirs of Trias* v. *Porto Rico Leaf Tobacco Co.,* 1941, 59 P. R. R. 228 and *De Thomas* v. *Delta S.S. Lines,* supra, this Court fixes the reasonable attorney's fees for plaintiffs in the amount of $12,500.00. Once a finding of obstinacy is made, not only are attorney's fees mandatory, *Zalduondo* v. *Mendez,* 1953, 74 P.R.R. 597, prejudgment interest from the date of the filing of the complaint are also obligatory. Title 32, Laws of Puerto Rico Annotated, App. II, Rule 44.4(e); *Rivera* v. *Rederi A/B Nordstjernan,* supra; *Petition of City of New York* (2 Cir. 1964). 332 F. 2d 1006, 1008.

The third party defendant must also be a recipient of an award of attorney's fees because of the third party plaintiffs' obstinacy. *Pizarro Felix* v. *Victory Carriers, Inc.,* supra; *De Thomas* v. *Delta S.S. Lines, Inc.,* supra. However, the third party defendants' counsel did not have to expend the time, effort and expense that plaintiff's attorney did and accordingly, the award in its favor is fixed at $7,500.00.

SUMMARY

Defendants' motions for judgment notwithstanding the verdict on plaintiffs' complaint are denied. Defendants' motion for a new trial on plaintiffs' complaint is denied. Defendants' motion for a new trial, or, in the alternative, for a remittitur on plaintiffs' complaint is denied. Defendants' motion for judgment notwithstanding the verdict on

their third party complaint is denied. Defendants' motion for a new trial on their third party complaint is denied.

Plaintiffs' motion for the award of attorney's fees for obstinacy and prejudgment interest is granted; attorney's fees are fixed in the amount of $12,500.00, to be pro-rated to the widow and child in the same ratio as the verdict of each bears to the total verdict. Prejudgment interest shall run on the jury verdict from the 9th day of June, 1971 and interest on the award of attorney's fees shall run from the date of the entry of this Order.

Third party defendant's motion for the award of attorney's fees for obstinacy is granted; attorney's fees in favor of third party defendant are fixed in the amount of $7,500.00. Interest on said award shall run from the date of the entry of this Order. The judgment entered after the jury verdict shall be appropriately amended. This is an Order.

Given in San Juan, Puerto Rico, this 13th day of March, 1974.

/s/ JOSE V. TOLEDO
Jose V. Toledo
Chief Judge

Opinion of United States Court of Appeals
Dated April 14, 1975

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 74-1204

CARMEN CARRILLO VDA. DE CERICH ET AL.,

Plaintiffs-Appellees,

v.

SAMEIT WESTBULK AND JOHAN HAGENES,

Defendants and Third-Party Plaintiffs-Appellants,

v.

CARIBE SHIPPING COMPANY, INC., ET AL.,

Third-Party Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[385 F.Supp. 119]

Before:

COFFIN, *Chief Judge,*
ALDRICH and MCENTEE, *Circuit Judges.*

JOSE L. NOVAS DUENO, with whom Hartzell, Ydrach, Mellado, Santiago, Perez & Novas and Haight, Gardner, Poor & Havens were on brief, *for appellants.*

HARVEY B. NACHMAN, with whom Nachman, Feldstein & Gelpi was on brief, *for Carmen Carrillo vda. de Cerich, et al.*

HARRY ANDUZE MONTANO, with whom Rieckehoff, Calderon, Rosa-Silva & Vargas was on brief, *for Caribe Shipping Company, Inc., et al.*

April 14, 1975

ALDRICH, *Senior Circuit Judge.*

On November 9, 1970, at San Juan, plaintiff's decedent, Cerich, a longshoreman employed by Caribe Shipping Co., Inc. (stevedore) was engaged in unloading automobiles from a hold of the M/V Westbulk, a Norwegian flag vessel owned and operated by defendants. When an afternoon rain called a halt to this activity some longshoremen sought shelter below decks. Cerich entered a car still in the hold, which could be found to be a not uncommon or forbidden practice. An hour later, the rain continuing, the whistle was sounded to signal the workday's end. Unnoticed, Cerich failed to join the longshoremen who left the vessel. Without inspecting (or without adequately inspecting), the vessel's crew closed the hatches by an automatic mechanism subject to their exclusive control, leaving the holds unlighted. The following morning, Cerich's body was discovered near a ladder at the bottom of the

hold, some four or five levels below the tweendeck where he had last been seen the previous day.

In response to special questions the jury found the vessel unseaworthy, defendants negligent, and Cerich contributorily negligent to the extent of 10%, and rejected defendants' third-party complaint against the stevedore for indemnification. *See generally Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 1956, 350 U.S. 124.[1] Defendants appeal.

In the district court defendants, on the issue of unseaworthiness, contended that since the hatches were not closed until Cerich's employment had terminated for the day, they no longer owed him a duty. If it could be found that he wilfully remained below, this would be an understandable

[1] Under prevailing interpretations of Congressional enactments, the general maritime law governs actions in Puerto Rico to the extent consistent with local law. *See Alcoa Steamship Co.* v. *Perez Rodriguez*, 1 Cir. 1967, 376 F.2d 35, 37-38, *cert. denied*, 389 U.S. 905; *Waterman Steamship Corp.* v. *Rodriguez*, 1 Cir., 1961, 290 F.2d 175, 179-80. Section 31 of the Puerto Rico Workmen's Accident Compensation Act, 11 L.P.R.A. § 32, authorizing third-party actions based upon existing law, has been held to encompass third-party claims by longshoremen under the general maritime counts of negligence and unseaworthiness. *Alcoa*, ante, 376 F.2d at 37; *Waterman*, ante, 290 F.2d at 180; *Guerrido* v. *Alcoa Steamship Co.*, 1 Cir., 1956, 234 F.2d 349, 355-57. However, the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, effective November, 1972, no longer permits actions by longshoremen based upon unseaworthiness, nor claims by vessels against stevedores for indemnity, under the general maritime law. *Id.*, § 905(b). *See Julian* v. *Mitsui O.S.K. Lines, Ltd.*, 5 Cir., 1973, 479 F.2d 432, 433-34, *cert. denied*, 414 U.S. 1093. Nevertheless, since the current action was filed June 8, 1971, and the third-party complaint August 11, 1971, though judgment was not entered until January 16, 1974, we need not decide whether the plaintiff's charge of unseaworthiness and the vessel's claim for indemnity might survive this change in the general maritime law because specifically authorized by the Commonwealth.

position. However, there was nothing about the nature of the cargo, *i.e.*, attractive for pilfering, to make this a likely possibility. Under such circumstances defendants were on the horns of a dilemma; either they were negligent in failing to inspect in case a seaman had fallen asleep or was otherwise incapable of responding to the whistle or, if the duty of checking was the stevedore's, nonetheless defendants made the vesel unseaworthy for a longshoreman legally entitled to a safe exit. On either basis defendants had no defense on the issue of liability. The fact that they may have had a valid claim for indemnification was no defense against imposition of obstinacy damages with respect to that failure to concede. *Rivera* v. *Rederi A/B Nordstjernan*, 1 Cir., 1972, 456 F.2d 970, 975 & n. 11, *cert. denied*, 409 U.S. 876.

If there were some possibility of thinking Cerich 100% contributively negligent, that is, that the sole fault was his, we might have a different question. But while it was not surprising for the jury to have found contributory negligence of some sort, it seems inconceivable that any finder of fact would have placed the blame for this accident upon Cerich alone. Although defendants had a litigable issue on contributory negligence, therefore, we do not think it an abuse of discretion for the court to find obstinacy in defendants' failure to concede their liability. *Cf. Fireman's Fund Ins. Co.* v. *Santoro*, 1 Cir., 1967, 376 F.2d 157, 160; *Soto* v. *Lugo*, 1954, 76 P.R.R. 416, 418-19; *Mercado* v. *American R.R. Co.*, 1943, 61 P.R.R. 222, 230.

Cerich's contributory negligence, however, does give rise to the initial issue raised in defendants' brief, the failure of the court to accept their views on the matter of their claim over against the stevedore for indemnification, refusing their requests to charge, and denying their motion for judg-

ment n.o.v. against the stevedore in light of the jury's finding.

That a stevedore's warranty of workmanlike performance encompasses a promise to provide longshoremen free of negligence seems well settled. *See Hartnett* v. *Reiss S.S. Co.*, 2 Cir., 1970, 421 F.2d 1011, 1018, *cert. denied*, 400 U.S. 852; *Arista Cia. DeVapores, S.A.* v. *Howard Terminal*, 9 Cir., 1967, 372 F.2d 152, 154. The vessel's primary argument here invokes a "per se" rule of indemnification, apparently embraced in the Second, Fourth, and Ninth Circuits, that a finding of contributory negligence on the part of a plaintiff longshoreman is per se proof of a breach of warranty of workmanlike performance by his employer. *See United States Lines, Inc.* v. *Jarka Corp. of Baltimore*, 4 Cir., 1971, 444 F.2d 26, 28; *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 395 U.S. 946; *Arista Cia.*, ante, 372 F.2d *denied sub nom. Golden Marine Co., Inc.* v. *Trelleborgs Angfartygs A/B*, 395 U.S. 946; *Arista Cia., ante*, 372 F.2d at 154. However, defendants overstate the rule (and parenthetically, the stevedore understates it). The allegedly negligent conduct must be in the course of his employment. If the jury had found Cerich negligent in going to sleep, so that he could not respond to the whistle, this negligence might have been charged back to the stevedore. And if he had been hurt while tatempting to leave the ship immediately after the whistle blew, and before the hatch was closed, just as the shipowner would have owed him a seaworthy vessel for the purpose of getting ashore, so, too, any contributory negligence here would be chargeable against his employer. But what, on the record, we cannot tell is when the contributory negligence found by the jury occurred. If it had been by carelessly, or foolishly, wandering around in the dark after the defendants had prevented his leaving by

improperly closing the hatches, it would not be proper to charge this to his employer. *Cf. Waterman Steamship Corp.* v. *David*, 5 Cir., 1965, 353 F.2d 660, 664-66, *cert. denied*, 384 U.S. 972.

It is elementary under principles of respondeat superior that no right of indemnity lies against an employer for actions of his employees taken beyond the scope of employment. *See Ira S. Bushey & Sons, Inc.* v. *United States*, 2 Cir., 1968, 398 F.2d 167, 170; *Drewery* v. *Daspit Bros. Marine Divers, Inc.*, 5 Cir., 1963, 317 F.2d 425, 426-28 and n. 1.[2] However, defendants failed to request that the special question to the jury be restricted to the course of Cerich's employment.[3] It is no answer that in their final argument to the jury defendants may have confined themselves to discussing possible acts by Cerich that would, in fact, have met that test. A jury is not to be foreclosed from reaching conclusions of fact plainly warranted on the record simply

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[2] No case, in "per se" jurisdictions or otherwise, appears to have faced this issue in the context of a maritime indemnity claim. Most simply recite that the injured longshoreman had been acting "in the course of his employment," *see Ryan*, ante, 350 U.S. at 125; *Humble Oil & Ref. Co.* v. *Philadelphia Ship Maintenance Co.*, 3 Cir., 1971, 444 F.2d 727, 729, or was injured "while working." *See, e.g., Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.*, 1958, 355 U.S. 563, 566; *Chinese Maritime Trust, Ltd.* v. *Carolina Shipping Co.*, 4 Cir., 1972, 456 F.2d 192, 193 (per curiam); *Arista, ante*, 372 F.2d at 153; *Waterman S.S. Corp.* v. *David*, ante.

[3] We note here our vigorous disagreement with the statement in plaintiff's brief that it was a "vice" to have presented the degree of contributory negligence to the jury at all. Rather, it is a wise practice, for a number of reasons. *See Page* v. *St. Louis Southwestern Ry. Co.*, 5 Cir., 1965, 349 F.2d 820, 824, and n. 12. *Cf. Albergo* v. *Reading Co.*, 3 Cir., 1966, 372 F.2d 83, 86, *cert. denied*, 386 U.S. 983; *Skidmore* v. *Baltimore & O. R. Co.*, 2 Cir., 1948, 167 F.2d 54, 56-70, *cert. denied*, 335 U.S. 816.

because counsel may not have discussed them. There should have been a special question on course of employment or, alternatively, requests for instructions so restricted. Defendants' requests having been overbroad, their objections based on Cerich's contributory negligence must be overruled without reaching the question whether we would adopt the per se rule, or the looser "factor" rule applied in the Fifth Circuit, *see, e.g., Julian,* note 1, ante, 479 F.2d at 433.

There was a basis for defendants' claim for indemnification by the stevedore other than Cerich's contributory negligence, namely, that there was a responsibility on the part of the stevedore to check that all its men had come ashore. This was a jury question that we will deal with, post, on the matter of obstinacy findings. We first consider defendants' objections with respect to plaintiff's damages.

In their brief defendants say that over their objection the court charged the jury that it might consider "the survivor's grief and mental anguish," and proceed to argue that this was error. We do not reach the question; defendants did not in fact adequately save their objections, either formally or informally. Because an important point of practice is involved, we go into this in some detail.

Prior to the presentation of their final arguments to the jury, the court, pursuant to F.R. Civ. P. 51, discussed with counsel the general substance of the proposed charge and noted what requests it would give and what deny. Defendants proceeded to note their objections to the proposed granting of certain of plaintiff's requests, notably No. 21. Request No. 21, relating to damages, was over a page long and certain portions of it were correct beyond question. Defendants' present claim that they objected to the inclusion of grief and mental anguish could only be supported,

if at all, by their alleged general objection to the entire request. What defendants said, however, seems notably more restricted.[4]

After the charge the following occurred.

"Mr. Nachman (counsel for plaintiff). The plaintiff has no exceptions or request or additional request other than as stated prior to the calling of the jury.

Mr. Novas (counsel for defendants). Your Honor, at this time we would like to renew our objection and to take exception to the denial of such instructions on the part of your Honor.

The Court. Let the record so reflect.

Mr. Novas. In order to avoid any unnecessary waste, great wasting of time, if your Honor approved and my colleague here so stipulates I can base my objection and renew my objection and renew my exceptions just by referring to the number.

Mr. Nachman. I will stipulate that you say the exact same thing that you said before.

The Court. Exactly the same words that you originally said.

Mr. Anduze (counsel for stevedore). All right, we will stipulate that.

The Court. All right, the parties stipulate and the Court accepts the stipulation."

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[4] "Our last objection to plaintiffs' request for instructions deals with request for instruction No. 21 . . . . We object specifically to that part of it that includes loss of companionship as a proper item of recovery in a cause of action based on . . . the alleged breach of the seaworthiness warranty." This did not, even as of that time, properly call the court's attention, *United States* v. *Lachmann,* 1 Cir., 1972, 469 F.2d 1043, 1044, *cert. denied,* 411 U.S. 931, to an objection to the inclusion of grief and mental anguish, a recognized feature of Puerto Rico law.

F. R. Civ. P. 51 provides in part as follows.

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

This means after the charge, not before, *United States* v. *Taglianetti*, 1 *Cir.*, 1972, 456 F.2d 1055, 1057; *Marshall* v. *Nugent*, 1 *Cir.*, 1955, 222 F.2d 604, 615, as counsel for defendants should well know. *Rivera* v. *Rederi A/B Nordstjernan*, 456 F.2d ante at 976. The many reasons for this have been collected in *Dunn* v. *St. Louis-San Francisco Ry. Co.*, 10 Cir., 1966, 370 F.2d 681, where the court noted express disapproval of an attempt, as in the case at bar, to circumvent the rule by a post-charge stipulation.

In our discretion we may overlook insufficient compliance with the rule, *Bouley* v. *Continental Cas. Co.*, 1 Cir., 1972, 454 F.2d 85, but a party takes his chances and cannot rely on an assurance by the district court that his rights are saved. *Dunn*, ante, 370 F.2d at 684. In the case at bar defendants' procedure was altogether inadequate. And, turning to the merits, if the court's charge was in fact error, that fact is not so clear that we will treat it in the absence of timely objection.

We deal, finally, with the matter of counsel fees and prejudgment interest for obstinacy, *see* Puerto Rico Rules of Civil Procedure 44.4(d) and (e), a matter which from time to time has given us concern. There are dangers of its overapplication. In the first place, a judge who has lived with a case that may have seemed to him to raise a very litigable question at first, may forget this, once the jury has found

for the plaintiff, and think the conclusion obvious from the beginning. It is not to be overlooked, however, that this is basically a subjective[5] penalty, not a pro forma award for winning a meritorious case.

Secondly, desirable as it may be to have suits settled rather than tried, a practice whereby a court weighs, either at the time, or afterwards, whether a party's offer was reasonable or not would be very troublesome. It does not become less so when one realizes that the judge, concerned with a heavy calendar, is not altogether a disinterested party, no matter how well-intentioned.

We may remark, too, particularly where a plaintiff has nothing to lose by making what might be thought unreasonable demands (for a plaintiff who has no assets the rule is a one-way street) that we would be naive if we thought that threats to demand obstinacy fees if a defendant did not improve his offer were not often an important part of a plaintiff's armory. To some extent, this may be a reason for the rule, but it is easily capable of abuse.

Finally, we are troubled, even to the point of suggesting possible constitutional overtones, with the automatic award of prejudgment interest where it is found that a defendant has been obstinate in some, but not in all, particulars. As the court observed in *Heirs of Trias* v. *Porto Rico Leaf Tobacco Co.*, 1941, 50 P.R.R. 228, at 229, the award of fees is for "the work necessarily done by the attorney for the adverse party." A defendant may, as here, be obstinate in not admitting liability, but not obstinate with respect to contributory negligence and damages. The necessity of proving liability may not have delayed reaching the case for

[5] By using the word "subjective" we do not mean that personal good faith is the exact test. A position may be too unreasonable to be so excused.

trial, and its actual proof may have required but half a day, while the rest of the trial took a week. The defendant may think he was not obstinate at all—but if the court finds against him on one issue, should the plaintiff receive his counsel fees for the entire case, including those claims which the adverse party was not obstinate in resisting? We have indicated otherwise. *See Pan American World Airways, Inc.* v. *Ramos*, 1 *Cir.*, 1966, 357 F.2d 341, 342. We may similarly question, if a defendant's partial obstinacy caused no delay of any consequence, whether a penalty of prejudgment interest may involve constitutional infirmities.[6]

None of these questions is raised with respect to the award to the plaintiff in the case at bar, as defendants have objected only to the finding of obstinacy, not to the amount of the imposition. We do, however, have a serious question regarding the award to the stevedore, third-party defendant. With respect to the claim for indemnity, the court expressly found the "evidence could have supported either conclusion." It also found that the third-party defendant seemed interested in settling, but third-party plaintiff did not. If this is all there was to it—if a party is obstinate simply because he wants to try a legitimate issue—this is not a concept of a right to trial in a free society that we would easily endorse. Nor do we think it the view of the Supreme Court of Puerto Rico. In *Mercado* v. *American R.R. Co.*, ante, 61 P.R.R. at 230, for example, the court said,

> "It seems unnecessary to explain that when the circumstances of the case really justify the defendant in believing that plaintiff's pretensions lack merit, it is not

[6] As being, for example, a penalty unrelated, or disproportionate to the offense, and one which falls upon defendants and never upon plaintiffs.

> bound to admit a responsibility which it, in good faith, does not believe it has."

If a party, for example, could fairly be appraised as having a 50/50 chance of winning a liquidated claim, is he obstinate if he refuses a 50% offer?

Before we endorse a principle that a party with a supportable claim is obstinate simply because it prefers to litigate than to compromise, we would want to be sure that this is the question that is before us, and we would also wish full briefing on such an important issue.

The award of counsel fees to the stevedore is vacated and the case remanded for further, or more explicit, findings by the district court, with a return to this court if either party so wishes. The judgments of the district court are otherwise affirmed.

Opinion of United States Court of Appeals
Dated May 29, 1975

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 74-1353

RUBEN SANTIAGO MARTINEZ,

Plaintiff-Appellee,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Defendant and Third-Party Plaintiff-Appellant,

v.

FRED IMBERT, INC.,

Third-Party Defendant-Appellee.

No. 74-1354

RUBEN SANTIAGO MARTINEZ,

Plaintiff-Appellant,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Defendant and Third-Party Plaintiff-Appellee,

v.

FRED IMBERT, INC.,

Third-Party Defendant-Appellee.

Opinion of United States Court of Appeals

No. 74-1355

RUBEN SANTIAGO MARTINEZ,

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COMPAGNIE GENERALE TRANSATLANTIQUE,

Defendant and Third-Party Plaintiff-Appellee.

v.

FRED IMBERT, INC.,

Third-Party Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before:

ALDRICH, McENTEE and CAMPBELL,
Circuit Judges.

WILLIAM M. KIMBALL, with whom Jose L. Novas-Dueno, Hartzell, Ydrach, Mellado, Santiago, Perez & Novas, and Burlingham Underwood & Lord were on briefs, *for Compagnie Generale Transatlantique.*

CHARLES A. CORDERO, *for Fred Imbert, Inc.*

HARVEY B. NACHMAN, with whom Nachman, Feldstein & Gelpi was on briefs, *for Ruben Santiago Martinez.*

May 29, 1975

McENTEE, *Circuit Judge.*

The familiar longshoreman-shipowner-stevedore triangle has led to the three appeals presented in this case. Plaintiff Santiago Martinez, employed as a longshoreman by Fred Imbert, Inc., was working in the hold of the M/V FORT DESAIX when he was struck and pinned by a moving pallet on November 9, 1968. He sued defendant Compagnie Generale Transatlantique, the shipowner, who in turn filed a third party complaint seeking indemnity from plaintiff's employer, Imbert (the stevedore). By a general verdict the jury awarded the longshoreman $90,000 and found for the stevedore in the indemnity action. The shipowner appeals from both judgments. In addition, the longshoreman appeals from the district court's denial of his motion to award attorney's fees and prejudgment interest against shipowner for obstinacy, and the stevedore also appeals the denial of an award for attorney's fees and other defense costs it incurred. We conclude that the indemnity action must be retried, but reject the other appeals.

The shipowner's first argument is that there was not sufficient evidence to allow the jury to find for the longshoreman. We disagree. The unloading on the ship was being done by a married winch operation. This required the use of two winches pulling against each other in synchronization to raise a pallet of cargo from the hold where the longshoreman was working. If one winch failed or was not operated correctly, the cargo would plumb under the opposite winch. In the instant case the onshore winch stopped or did not start and thus allowed the full pallet of cargo to plumb under the offshore winch and pin the longshoreman. There

was testimony that the same winch had stopped about two hours earlier, but no injury resulted. On both occasions a member of the ship's crew repaired the winch or replaced fuses and signaled the winchman to resume operations. The electric winches had separate control wheels, but one winchman operated both winches by sticks attached to the wheels for two and one-half hours and then was relieved by the other winchman.

On the unseaworthiness theory the shipowner essentially argues that the winch may have overloaded and blown a fuse because the winchman was confused as to which way to operate the winch or because the winchman accelerated the winch too rapidly. Even if a winchman was confused at trial as to which way to turn the winches in this married operation, that does not necessarily mean he was confused at the time of the accident years earlier. The important point is that both of these theories were presented to the jury under proper instructions, and the shipowner cannot reargue here that the ship was seaworthy because the evidence allowed an inference that the accident occurred because of a longshoreman's negligence with no more than instantaneous effect. *See Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494 (1971). The evidence does not compel that inference, and therefore we need say nothing more about this argument. Nor are we impressed by the argument that the evidence showed the winch "stopped," not that it "broke or failed." By this distinction the shipowner attempts to avoid the effect of *Greene* v. *Vantage S.S. Co.*, 466 F.2d 159, 163 (4th Cir. 1972): "Where an appliance or piece of equipment breaks or fails in the normal course of use, a plaintiff need not show why the failure occurred, but only that it did occur with the resulting injury." But the jury could have found on the evidence that the winch did

fail in the normal course of use. The last attack made on the unseaworthiness theory is that the ship would have been unseaworthy had a fuse not blown when it was overloaded, so the ship could not have been unseaworthy because a fuse blew. The defect in this argument is that the married winch operation may have required that a cutoff device stop both winches automatically if one failed. We are not prepared to say that a jury could not have so applied the seaworthiness requirement.

Plaintiff's separate count for negligence created complications that we have had occasion to speak about before. As the instant charge illustrates, it is difficult enough to charge a lay jury in a seaman's case without adding what are not merely redundant questions, but the same questions over again in a more complicated form.

The court charged the jury with respect to the negligence count that plaintiff claimed the shipowner to have been negligent in four particulars:

> "(a) In failing to furnish the plaintiff with a reasonably safe place to work. (b) In failing to supply the plaintiff with a reasonably safe vessel and appliances. (c) In failing to provide a proper winch to remove the cargo. (4) In failing to properly supervise the discharging operations."

It must be apparent that the first three claims were fully and exactly covered by the seaworthiness count and the court's proper charge that proof as to any of them would impose unseaworthiness liability even though the shipowner was entirely without fault. No purpose is served by asking the jury to resolve the same issues again with the added requirement that there be affirmative proof of negligence. To paraphrase the Court in *Jarecki* v. *G. D. Searle & Co.*,

367 U.S. 303, 307 (1961), having established a hole in the fence for one cat, there is no need to construct another hole for a second. We dealt with this question in *Peymann* v. *Perini Corp.*, 507 F.2d 1318, 1323 (1st Cir. 1974), *cert. denied*, 43 L.E.2d 780 (1975), where we pointed out that the negligence count was superfluous when it merely re-alleged the same defects that made the ship unseaworthy.

Here, it can have made no difference whether the court's charge with respect to negligence under items (a), (b) and (c) was sufficiently favorable to the shipowner, or whether the evidence warranted a finding of lack of due care on the shipowner's part. The charge was certainly no less favorable to the shipowner than was that on unseaworthiness, and both theories were submitted to the jury which returned, without objection, a general verdict. On this record we perceive no way in which the shipowner may have been prejudiced.

The only additional matter alleged in the negligence count was item (d), failing to properly supervise the discharging operations. With respect to this, the court charged,

> "The shipowner has no duty to oversee, supervise or direct the methods by which or manner in which the stevedoring corporation and its employees perform the stevedoring services, but the shipowner must correct any dangerous condition if it is known or discovered by him."

After the charge, at the sidebar, the court stated that it had given this request of the shipowner inadvertently, as it was too favorable. On the shipowner's appeal we need not consider whether it was too favorable for certainly it was favorable enough. Nor do we see any conflict between this in-

struction and item (d), which was not stated to the jury as a ruling of law, but simply as what plaintiff claimed.

The court also charged that the shipowner might be denied indemnity if the jury found that the shipowner "by the action of the mate or the crew member, acquiesced or consented to the continuance of the stevedore's conduct of which he now complains . . ." and the shipowner apparently objects that this contradicted the charge that it had no duty to supervise. We see no inconsistency. To allow denial of indemnity upon a finding that the shipowner approved of the stevedore's performance is not to impose liability upon a finding that the shipowner failed to disapprove of the stevedore's performance. Since the shipowner's single remaining objection to the charge in the longshoreman's action depends on quoting the charge out of context, we find no error there. Consequently, the judgment for the longshoreman is affirmed.

The longshoreman's appeal from the finding that the shipowner was not obstinate within the meaning of Puerto Rico Rules of Civil Procedure 44.4(d) and (e)* need not detain us long. By converse reasoning to that applied above, the shipowner had supportable claims either that it was not liable or that it was liable to only a small degree. The jury might have found that the winchman caused this accident by

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* These rules provide as follows:

"(d) Attorney's fees. Where a party has been obstinate, the court shall in its judgment impose on such person the payment of a sum for attorney's fees."

"(e) [Legal interest.] In all cases of money collection where the party has been obstinate the court shall impose on such person the payment of interest according to law, from the time in which there appeared cause of action and in case of damages, such payment of interest shall be imposed from the time the filing of the claim was made and computed on the amount of the judgment. . . ."

mishandling the winch, in which event *Usner* would have barred a finding of unseaworthiness. Or the jury might have found that the plaintiff longshoreman was contributorily negligent—by loading another pallet rather than standing out of the way during the lifting phase as he was required to. Since the first failure of this winch did not hurt anyone and should have alerted the longshoremen in the hold not to unnecessarily expose themselves to danger, the jury could have assessed the proportionate contribution of such negligence at a high figure. The diagnosis of plaintiff's problem as "conversion reaction, chronic related" also produced substantial issues regarding the amount of damages. These considerations amply support the district court's denial of counsel fees and prejudgment interest.

We turn now to the indemnity issue. The shipowner objected to the following charge:

> "If a contributing cause of plaintiff's injury was his own negligence, that is a factor to be considered by you in determining whether the stevedore has breached its warranty to the shipowner and [if] after considering all the evidence in the case you find that the stevedore has breached its warranty, then the shipowner would be entitled to recover indemnity from the stevedore."

Its claim is that the jury should have been charged that "If a contributing cause of plaintiff's injury was his own negligence, then the shipowner would be entitled to recover indemnity." Another portion of the charge adequately covered the discrete issue of whether shipowner was precluded from recovering indemnity by conduct on its part, *see Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563, 567 (1958), so that issue is not involved here. This dispute is whether a longshoreman's contributory

negligence automatically establishes breach by the longshoreman's employer of its warranty of workmanlike performance. In the Fifth Circuit it appears that contributory negligence by a longshoreman does not necessarily amount to breach of warranty by the stevedore. Instead, the longshoreman's contributory negligence is regarded as one consideration in determining whether the stevedore breached its warranty. *See Julian* v. *Mitsui O.S.K. Lines, Ltd.*, 479 F.2d 432, 433 (5th Cir.), *cert. denied sub nom. Mitsui O.S.K. Lines, Ltd.* v. *Strachan Shipping Co.*, 414 U.S. 1093 (1973); *D/S Ove Skou* v. *Hebert*, 365 F.2d 341, 350 (5th Cir. 1966), *cert. denied sub nom. Southern Stevedoring & Contracting Co.* v. *D/S Ove Skou*, 400 U.S. 902 (1970); *Lusich* v. *Bloomfield S.S. Co.*, 355 F.2d 770, 778 (5th Cir. 1966). It appears that the Third Circuit accepts this approach also. *See Shaw* v. *Lauritzen*, 428 F.2d 247 (3d Cir. 1970). In the Second, Fourth, and Ninth Circuits the rule is that contributory negligence by the longshoreman within the scope of his employment is imputed to the stevedore. *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334, 1336-37 (2d Cir.), *cert. denied sub nom. Golten Marine Co.* v. *Trelleborgs Angfartygs A/B*, 395 U.S. 946 (1969); *Nicroli* v. *Den Norske Afrika-Og Australielinie*, 332 F.2d 651, 656 (2d Cir. 1964); *Damanti* v. *A/S Inger*, 314 F.2d 395, 399 (2d Cir.), *cert. denied sub nom. Daniels & Kennedy, Inc.* v. *A/S Inger*, 375 U.S. 834 (1963); *United States Lines, Inc.* v. *Jarka Corp. of Baltimore*, 444 F.2d 26, 28 (4th Cir. 1971); *Arista Cia. DeVapores, S/A* v. *Howard Terminal*, 372 F.2d 152, 154 (9th Cir. 1967). This also may be the rule in the Sixth Circuit. *See Turner* v. *Global Seas, Inc.*, 505 F.2d 751, 756-57 (6th Cir. 1974). We have recently held that "a stevedore's warranty of workmanlike performance encompasses a promise to provide longshoremen free of negligence. . . ." *Carrillo* v. *Sameit Westbulk*, No. 74-1204 (1st Cir., April 14, 1975). In light of that well-settled rule it is difficult to argue that a stevedore has not breached its warranty where it turns out that one of its employees was negligent within the scope of his employment. We believe the correct rule is that the plaintiff longshoreman's negligence must be imputed to his employer as a basis for indemnity. Of course, this does not mean that a finding of contributory negligence automatically establishes the shipowner's right to indemnity. The fact finder may still find that there was conduct by the shipowner sufficient to preclude indemnity. *See generally Hurdich* v. *Eastmount Shipping Co.*, 503 F.2d 397 (2d Cir. 1974).

On the evidence and the charge in this case, coupled with the general verdict, it is entirely possible that the jury found the longshoreman contributorily negligent. Accordingly we are compelled to reverse the judgment for the stevedore and remand for a new trial. It is no answer that the jury may have found that the shipowner's conduct in providing a defective winch was conduct precluding indemnity. If we knew that was their finding, we could avoid a new trial, but we cannot speculate that the error in the charge did not prejudice the shipowner. This posture evidences once again the usefulness of the procedure authorized in Fed. R. Civ. P. 49(b). If this case had been submitted to the jury for a general verdict accompanied by answers to appropriately phrased interrogatories, the needless waste of a new trial could have been avoided. The debate between the parties over who should bear responsibility for this shortcoming is somewhat shortsighted. Some measure of the blame for not requesting such a submission must be laid at the shipowner's feet, but an equal measure must be assigned to the stevedore. And of course

the court itself would have been well-advised to utilize this procedure.

The remaining issue is the stevedore's appeal. It argues that the shipowner was obstinate in not conceding unseaworthiness and in not being sufficiently receptive to settlement negotiations. Reliance is placed on *Rivera* v. *Rederi A/B Nordstjernan,* 456 F.2d 970 (1st Cir. 1972), where the imposition of attorney's fees for obstinacy was upheld against the shipowner even though that party prevailed in the third party action. But this case is not analogous to *Rivera.* It upheld imposition of attorney's fees for the benefit of the plaintiff longshoreman, not for the stevedore. *Rivera* also implicitly recognized that obstinacy in defending against a plaintiff does not necessarily establish obstinacy in claiming indemnity from a third-party defendant. *See id.* at 975 n. 11. Even if we had decided the appeal of the indemnity action differently, the facts of this case would not support a finding of obstinacy against the shipowner and in favor of the stevedore. We need not reach the stevedore's remaining point, that it is entitled to counsel fees and other defense costs from the shipowner for its breach of its warranty to the stevedore, since that question has been mooted by our reversal in the indemnity action.

The judgment for the plaintiff longshoreman is affirmed; the denial of his motion for an obstinacy award is also affirmed; the judgment for the stevedore is reversed and that case is remanded for a new trial; and the appeal of the stevedore is dismissed.

Opinion of United States Court of Appeals
Dated August 8, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 967, 1019—September Term, 1974.

(Argued May 19, 1975 Decided August 8, 1975.)

Docket Nos. 75-7127, 75-7151

JACKSON O. KING,

Plaintiff-Appellee,

v.

DEUTSCHE DAMPFS-GES,

Defendant and Third-Party Plaintiff-Appellee-Appellant,

v.

INTERNATIONAL TERMINAL OPERATING CO. INC. and COURT CARPENTRY & MARINE CONTRACTING COMPANY,

Third-Party Defendants-Appellants.

Before:

MULLIGAN, TIMBERS and GURFEIN,

Circuit Judges.

Opinion of United States Court of Appeals
Dated August 8, 1975

Appeal from judgment entered after jury trial in the Southern District of New York, Constance Baker Motley, *District Judge*, awarding plaintiff $42,900 damages against shipowner for injuries sustained while working aboard ship and awarding shipowner full indemnification against both the stevedore and plaintiff's employer.

Affirmed.

LESTER E. FETELL, Brooklyn, N.Y. (Solomon J. Cohen, Benjamin J. Sergi, and Sergi & Fetell, Brooklyn, N.Y., on the brief), *for Plaintiff-Appellee Jackson O. King.*

THOMAS F. MOLANPHY, New York, N.Y. (James M. Hazen, and Haight, Gardner, Poor & Havens, New York, N.Y., on the brief), *for Defendant and Third-Party Plaintiff-Appellee-Appellant Deutsche Dampfs-Ges.*

DOUGLAS A. BOECKMANN, New York, N.Y. (Fogarty, McLaughlin & Semel, New York, N.Y., on the brief). *for Third-Party Defendant-Appellant International Terminal Operating Co. Inc.*

ALBERT V. TESTA, New York, N.Y. (Sidney A. Schwartz, Joseph Arthur Cohen, and Alexander, Ash, Schwartz & Cohen, New York, N.Y., on the brief), *for Third-Party Defendant-Appellant Court Carpentry & Marine Contracting Company.*

Opinion of United States Court of Appeals
Dated August 8, 1975

TIMBERS, *Circuit Judge:*

On this appeal from a judgment entered January 22, 1975 after a three day jury trial in the Southern District of New York, Constance Baker Motley, *District Judge*, awarding plaintiff $42,900 damages against the shipowner for injuries sustained while working aboard ship and awarding the shipowner full indemnification against both the stevedore and plaintiff's employer, the essential issues are:

(1) Whether the court erred in failing to dismiss the complaint for lack of sufficient evidence on the issue of unseaworthiness.

(2) Whether the court erred in granting judgment n.o.v. in favor of the shipowner on its indemnity claim against plaintiff's employer.

Finding no error, we affirm.

I.

Jackson O. King was employed as a marine carpenter by Court Carpentry & Marine Contracting Company (Court Carpentry) on June 18, 1968. He was injured while working in the hold of the M/S Trautenfels which was owned by Deutsche Dampfs-Ges (Deutsche). King entered the hold to secure cargo which previously had been loaded into the hold. In order to do so, he was required to walk directly on steel "I" or "H" beams which had been stowed side by side facing fore and aft to form a superdeck in No. 4 hatch, by the stevedore, International Terminal Operating Co. Inc. (ITO). While walk-

ing on the beams, King fell into a space between two of the beams and sustained an injury to his left knee.

The instant appeal is from the judgment entered after a second trial which began October 9, 1974.[1] In response to special questions, the jury found that King's injuries were caused by the vessel's unseaworthiness, but reduced its $57,200 verdict to $42,900 because of King's 25% contributory negligence. After instructions from the court, the jury answered further special questions by awarding indemnification in favor of Deutsche against ITO on the ground that ITO had breached its implied warranty of workmanlike performance in stowing the beams improperly so as to leave the space between the beams into which King fell; but the jury rejected Deutsche's claim of indemnity against Court Carpentry on the ground that Deutsche had not sustained its burden of proving that Court Carpentry had breached its implied warranty of workmanlike performance by failing to discover the dangerous condition.

On Deutsche's post trial motion for judgment n.o.v., the court held as a matter of law that Deutsche was entitled to judgment over against Court Carpentry, King's employer, in view of the jury's finding of contributory negligence on the part of King.

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[1] The first jury trial in October 1973 resulted in a finding that the vessel was seaworthy, but judgment in King's favor against Deutsche was rendered on the ground that the shipowner had been negligent. The third-party claim of Deutsche for indemnification against ITO and Court Carpentry had been severed prior to trial. The $30,000 verdict was reduced to $15,000 because of King's 50% contributory negligence. Upon motion, the court set aside the finding of negligence on the ground of insufficient evidence and ordered a new trial on the issue of unseaworthiness. Deutsche's petition for a writ of mandamus to vacate the order for a new trial was denied by us on July 18, 1974.

This appeal by ITO and Court Carpentry followed. Deutsche has taken a protective appeal against King and in opposition to the appeals of ITO and Court Carpentry which seek to overturn the indemnity awards.

II.

Turning first to the claim that the district court erred in failing to dismiss the complaint for lack of sufficient evidence on the issue of unseaworthiness, we hold that this issue was submitted properly to the jury and that there was ample evidence to support the jury's finding of unseaworthiness.

In determining whether a motion for a directed verdict should have been granted as appellants claim, it is axiomatic that the evidence must be viewed in the light most favorable to the party against whom the motion was made. *Bigelow* v. *Agway, Inc.*, 506 F.2d 551, 554 (2 Cir. 1974); *O'Connor* v. *Pennsylvania R.R. Co.*, 308 F.2d 911, 914-15 (2 Cir. 1962). King testified that he fell into a space between two of the beams stowed by ITO. This was corroborated by Andrew Auletti, also an employee of Court Carpentry and King's supervisor. Auletti testified that a careful gang of longshoremen would have stowed the beams so that they fitted together; that on other occasions he had seen such beams stowed tightly together; and that this was the way beams were supposed to be stowed.[2] Such evidence presented a jury issue as to

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[2] Appellants argue that Auletti's opinion as to what constituted proper stowage of beams was admitted erroneously because Auletti was not qualified as an expert with respect to the storage of cargo since he was not a longshoreman. The trial court of course has broad discretion to determine the qualifications of witnesses. *But-*

whether the ship was rendered unseaworthy due to improper stowage.

Deutsche and ITO at trial sought to establish that the space was on the periphery of the beams near the wall of the vessel, and that such spaces were commonly found and largely unavoidable. This evidence simply sharpened the issue of fact for the jury to resolve.[3] The court so held. We agree. See *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355 (1962); *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563 (1958).

On appeal we are no more free than the district court to ignore evidence favorable to plaintiff or "to set aside the jury verdict merely because the jury could have drawn different inferences. . . ." *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944); *Sentilles* v. *Inter-Caribbean Corp.*, 361 U.S. 107, 109-10 (1959). Our review is limited to determining whether there was substantial evidence to support the verdict that the vessel was unseaworthy be-

kowski v. *General Motors Corp.*, 497 F.2d 1158 (2 Cir. 1974). We find no abuse of discretion here. Auletti had worked with stowed cargo for some 28 years. He had had ample opportunity to observe that it was possible to fit steel beams together tightly. He knew what constituted careful, proper stowage. *Avena* v. *Clauss & Co.*, 504 F.2d 469, 472 (2 Cir. 1974); cf. *Tropea* v. *Shell Oil Co.*, 307 F.2d 757, 763 (2 Cir. 1962).

[3] Appellants' reliance on *Nuzzo* v. *Rederi A/S Wallenco, Stockholm, Sweden*, 304 F.2d 506 (2 Cir. 1962), is misplaced. There the space into which the plaintiff fell was on the periphery of the stowed planks where workmen were not likely to be walking—not an open space in the middle of the stowage, as here. Moreover, the evidence in *Nuzzo* established that the stow had been done properly. Under those circumstances, we held that there was insufficient evidence to support the finding of unseaworthiness.

cause the beams had been improperly stowed by ITO. We hold that there was substantial evidence.[4]

III.

The remaining issue is Court Carpentry's claim that the court erred in granting judgment n.o.v. in favor of Deutsche on its indemnity claim against Court Carpentry, King's employer, in view of the jury's finding of contributory negligence on the part of King.

The short answer to this claim of error is that it is foreclosed by a line of decisions by our Court stemming from *Italia Soc.* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964).[5] In *Mortensen* v. *A/S Glittre*, 348 F.2d 383, 385 (2 Cir. 1965), we held that the contributory negligence of an injured plaintiff was a breach of his employer's warranty of workmanlike performance, the breach of warranty following as a matter of law from the finding of contributory negligence. Appellant's claims to the contrary have been rejected by us in *Hartnett* v. *Reiss Steamship Co.*, 421 F.2d 1011, 1017-18 (2 Cir.), *cert. denied*, 400 U.S. 852 (1970), and *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334, 1337 (2 Cir.), *cert. denied*, 395 U.S. 946 (1969).

[4] Clearly, such improper stowage constituted a breach of ITO's warranty of workmanlike performance, thus entitling Deutsche to indemnification against ITO. *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

[5] Our recent decision in *Nye* v. *A/S D/S Svendborg*, 501 F.2d 376, 380 (2 Cir. 1974), *cert. denied*, —— U.S. —— (1975), is not to the contrary. There we observed that "[t]he principles set forth in cases dealing with a stevedore's implied warranty of workmanlike performance are not applicable in this case".

Opinion of United States Court of Appeals
Dated August 8, 1975

Moreover, contrary to Court Carpentry's assertion, no proof is required that the employer failed to correct a hazard or to prevent its employees from exposing themselves to a danger of which it had imputed knowledge. The warranty of workmanlike performance includes the furnishing of personnel who will not injure themselves. *McLaughlin* v. *Trelleborgs Angfartygs A/B, supra,* 408 F.2d at 1337.[6]

Affirmed.

[6] We repeatedly have rejected appellants' further argument that the grant of judgment in favor of the shipowner on its indemnity claim against the employer of an injured plaintiff deprives the employer of its right to jury trial under the Seventh Amendment. See, e.g., *McLaughlin, supra,* 408 F.2d at 1337-38; *Hartnett, supra,* 421 F.2d at 1017-18. Liability is imposed as a matter of law on the employer of a contributorily negligent plaintiff once the jury has made its finding of contributory negligence. Since the dispositive issue is that of contributory negligence which is left to the jury, there is no usurpation of the jury's function.

Opinion of United States Court of Appeals
Dated May 29, 1975

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 74-1204

CARMEN CARRILLO VDA. DE CERICH ET AL.,

Plaintiffs-Appellees,

v.

SAMEIT WESTBULK AND JOHAN HAGENES,

Defendants and Third-Party Plaintiffs-Appellants,

v.

CARIBE SHIPPING COMPANY, INC., ET AL.,

Third-Party Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[385 F.Supp. 119]

Before:

COFFIN, *Chief Judge,*
ALDRICH and MCENTEE, *Circuit Judges.*

JOSE L. NOVAS DUENO, with whom Hartzell, Ydrach, Mellado, Santiago, Perez & Novas and Haight, Gardner, Poor & Havens were on brief, *for appellants.*

HARVEY B. NACHMAN, with whom Nachman, Feldstein & Gelpi was on brief, *for Carmen Carrillo vda. de Cerich, et al.*

HARRY ANDUZE MONTANO, with whom Rieckehoff, Calderon, Rosa-Silva & Vargas was on brief, *for Caribe Shipping Company, Inc., et al.*

ON PETITION FOR REHEARING

May 29, 1975

PER CURIAM.

By a petition for rehearing shipowners raise a new and compound contention in support of their claim for indemnity, which essentially boils down to the assertion that the stevedore must answer for the negligence of its longshoreman even where such negligence occurred beyond the scope of their employment relationship. Shipowners based this theory upon cases holding that willful and unusually belligerent actions of a seaman, which assertedly exceed his duties unless taken in the interest of the ship, may nonetheless render the vessel unseaworthy. *See Boudin* v. *Lykes Bros. S.S. Co., Inc.*, 1955, 348 U.S. 336, 340; *Clevenger* v. *Star Fish & Oyster Co.*, 5 Cir., 1963, 325 F.2d 397, 400-02. We recognize the principle that an employer may be liable for injuries inflicted by its employee even though not strictly in the course of his employment, if it is closely connected. *See, e.g., Ira S. Bushey & Sons, Inc.* v. *United States,* ante. *But cf. Stewart* v. *Steamer Blue Trader,* 1 Cir., 1970, 428 F.2d 361 (per curiam). Thus, even willful conduct, of the sort involved

in the cases cited by shipowners, may bind an employer. *See Hartford Accident & Indemn. Co.* v. *Cardillo,* D.C. Cir., 1940, 112 F.2d 11, *cert. denied,* 310 U.S. 649. The difficulty here is caused by the fact that the jury may have found the longshoreman's negligent conduct quite unrelated to his work.

Moreover, even if the conduct of a seaman acting beyond the scope of his duties may constitute a violation of his shipowner's warranty of seaworthiness, it does not follow that the conduct of a longshoreman acting beyond the scope of his duties must transgress his stevedore's guaranty. The stevedore's warranty of performance is merely to render workman-like service, which by translation means to furnish workmen who will do their job in a safe and workman-like manner. It is in this area that the stevedore's obligation to supply workers who will exercise care for their own safety applies. *See Grayson* v. *Cordial Shipping Co.*, 7 Cir., 1974, 496 F.2d 710, 716; *McLaughlin* v. *Trelleborgs Angfartygs A/B,* ante; *Arista Cia. DeVapores, S.A.* v. *Howard Terminal,* ante. The special purpose of protecting seamen, as wards of the admiralty court, which forms the reason for the unlimited nature of the warranty of seaworthiness, does not carry over to the relationship between the shipowner and stevedore, which we hold, although broad, *Santiago Martinez* v. *Compagnie Generale Transatlantique,* 1 Cir., 5/29/75, is confined to the contract. If, for example, a longshoreman hid in the hold and remained after hours to commit larceny, and assaulted a member of the crew who discovered him, we cannot think that the stevedore would be liable to the crewman for the injury, even though the shipowner might be. No, in such case, would we see any basis for requiring the stevedore to indemnify the shipowner. The present case, assuming that

what the jury found to be the longshoreman's contributory negligence was unconnected with his employment, is far weaker than that. *Cf. LaBolle* v. *Nitto Line*, N.D. Cal., 1967, 268 F.Supp. 16.

Petition denied.

Supreme Court, U. S.
FILED
NOV 8 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-294

SAMEIT WESTBULK AND JOHAN HAGENES,
PETITIONERS,

v.

CARIBE SHIPPING CO., INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-294

SAMEIT WESTBULK AND JOHAN HAGENES,
PETITIONERS,

v.

CARIBE SHIPPING CO., INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT

Respondent opposes petitioners' request of Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit, dated April 14, 1975, and its order of May 29, 1975 denying petitioners' application for a rehearing. Both, judgment and order, are cor-

rect adjudications of the issues presented on appeal, issues that presented questions of local application only to Puerto Rico.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Rule 19.1(b) of the Rules of the Supreme Court. Respondent submits that in view of the limited importance of the questions presented and in consideration of the circumstances of this case, this Honorable Court lacks jurisdiction to issue a Writ of Certiorari.

Question Presented

Respondent respectfully submits that no special or important question of federal law has been presented by Petitioners. The intention of Petitioners is to have this Court substitute its evaluation of the evidence presented at the District Court, disregarding that of the jury and of the two Courts below.

Statement of the Case

Petitioners again insist that the District Court failed to present in its instructions to the jury the alternatives of the *per se* approach and the *factor* approach in the imposition of the contributory negligence of the deceased longshoreman to his stevedore employer. But, they failed to recognize that they did not save their objections to the Court's determination not to give their requested instructions. They were bound by F. R. Civ. P. 51, 28 U.S.C.A., to express their objection *after* the charge, see the Circuit Opinion, 514 F.2d 1214, at 1219, Appendix to the Petition,

pages 28(a) and 29(a). The Petitioners were presented with modified alternatives to their requests for charge number 32 and 33 but they refused to accept them.

The factual setting of the case is amply expressed by the District Court in its opinion, 385 F. Supp. 119, at 121-125.

The posture in which the Petitioners presented their claim for indemnity at the Trial Court was different from that they suggested in their post-trial motions, in their appeal and in this Petition for Certiorari. The indemnity action they consistently argued was going to turn upon the determination by the jury of whose responsibility it was to check the hold prior to it being closed, and this was a position which resulted after plaintiff and petitioners' witnesses failed to convalidate petitioners' theory that the respondent had a duty to count his men after the termination of a day-work.

The respondent's position was at all times that Petitioners had the responsibility of inspecting the hold prior to closing the hatches and that their failure to do so was the proximate producing cause of Alejandro Cerrich's death. This omission or failure to act barred the Petitioners from claiming any indemnity from the respondent, whether the indemnity was due based on the stevedores sub-standard performance or by imposing to him the negligence of the deceased longshoreman.

In this proper posture the case was sent to the jury, there are sufficient facts in the record to justify the verdict of the jury and the determination of both courts below. Petitioners failed to save adequately their objections to the instruction which were properly denied by the Court and cannot at this time assign this as error.

The Facts

Alejandro Cerrich was employed as a longshoreman by Caribe Shipping Co., Inc. (Caribe). On November 9, 1970, Cerrich was aboard the vessel M/V WESTBULK, engaged in the unloading operations in hold No. 2.

After longshoremen returned from lunch, work was stopped due to rain approximately at 2:30 p.m. Around 3:00 p.m. to 3:30 p.m. a signal was blown and the longshoremen were ordered to disembark.

All the longshoremen with the apparent exception of Cerrich, left the vessel after the second signal was blown. The Petitioners admitted that when Cerrich stayed behind he was not anymore in the service of the vessel nor was he engaged in stevedoring services. See Circuit Court's Opinion, 514 F.2d at 1217.

The members of the crew, without making an inspection of the hold, closed the hatches after 4:00 p.m. These vessel's hatches are operated only by her crew members for they are an automatic mechanism. (A. p. 41)

Next day the unloading operations were continued and work on hold No. 2 was completed during the morning. Alejandro Cerrich was later found dead by a member of the crew on the bottom of hold No. 2.

Alejandro Cerrich's widow and daughter filed an action against the shipowner, the Petitioners, who in turn brought an indemnity claim against the stevedore contractor, Caribe Shipping Co., Inc., the respondent.

After a trial, the jury rendered a verdict awarding Plaintiffs $100,800.00 on their claim against the Petitioners. The jury also, rendered a verdict in favor of Respondent and against Petitioners on the indemnity action. By stipulation, the parties had submitted to the jury a special verdict form. The jury found the M/V WESTBULK unseaworthy, also that the Petitioners had been negligent

and that Alejandro Cerrich had incurred in a contributory negligence of 10%. The jury was not required to express what action or conduct by deceased Alejandro Cerrich was found to be negligent.

Petitioners filed motions for judgment notwithstanding the verdict and in the alternative for a new trial. Respondent opposed the motions and requested attorney's fees. Petitioners' motions were denied and attorney's fees imposed upon them.

An amended judgment was entered to that effect and Petitioners appealed from the same. The Circuit Court affirmed and denied a rehearing.

Argument

I. UNDER THE ISSUE PRESENTED THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. § 1254(1) AND RULE 19.1(b) OF THE RULES OF THE SUPREME COURT.

The sole question presented by the Petitioners although compound, boils down as to whether the comparative negligence of a longshoreman is imputable, as a matter of law, to the stevedore employer; resolving in this fashion automatically the issue of liability and/or indemnity in a third-party action between the shipowner and the stevedore.

It is respectfully submitted that this question is not of special or important federal significance, nor does its adjudication by the courts below entail any conflict with any decision of this Court, or with the opinion of any other Circuit.

The question presented is only of local applicability to Puerto Rico

At 514 F.2d 1216-1217, Note 1, the Circuit Court expressed the legal basis for the third-party actions in

Puerto Rico, the general maritime law applies to actions in the Commonwealth only to the extent consistent with local law. Under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, no action by shipowner against the stevedore for indemnity can be maintained. As this Court has stated in *Cooper Stevedoring Co.* v. *Kople,* 417 U.S. 106, 113, 94 S. Ct. 2174, 40 L. Ed. 2d 694 (19), at Note 6:

> "The intent and effect of this amendment was to overrule this Court's decisions in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L. Ed. 1099, 66 S. Ct. 872 (1946), and Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 100 L. Ed. 133, 76 S. Ct. 232 (1956), insofar as they made an employer circuitously liable for injuries to its employee, by allowing the employee to maintain an action for unseaworthiness against the vessel and allowing the vessel to maintain an action for indemnity against the employer. See HR Rep No. 92-1441, pp. 4-8 (1972); S Rep No. 92-1125, pp. 8-12 (1972)."

In view of these developments, the only court of federal jurisdiction where actions in the nature of a third-party-claim for indemnity based on longshoremen maritime personal injuries can be maintained is in the Federal District Court for the District of Puerto Rico. And this action, as expressed by the Circuit Court, "might survive this change in the general maritime law because specifically authorized by the Commonwealth." See 514 F.2d at 1216-1217, end of Note 1. This was recognized by the Petitioners on their brief to the Circuit Court, page 17 and less emphatically to this Court in their Petition at page 11.

The matter is one of local application to Puerto Rico, rooted as previously expressed on local statute and based

in the special relationship between Congress and the Commonwealth of Puerto Rico. For these reasons, and by analogy, it is of applicability to this case this Court's decision in *Del Vecchio* v. *Bowers,* 296 U.S. 280, 285, 56 S. Ct. 190, 192; 80 L. Ed. 229:

> "In the view that the case does not fall within rule 38 (28 U.S.C.A. following Section 354), the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District. The longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement constitutes a precedent of general application. We therefore granted the writ because of the important question as to the effect of Section 20(d)."

The certiorari requested by the petitioners should be denied for certiorari jurisdiction "is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U.S. 251, 257-258, 36 S. Ct. 269, 271, 60 L. Ed. 629; and Mr. Justice Frankfurter's dissenting opinion in *Rogers* v. *Missouri Pacific Railroad Co.,* 352 U.S. 500, 530-532, 77 S. Ct. 443, 462-463, 99 L. Ed. (1955).

The opinion of the Circuit Court is not in conflict with any applicable decision of this Court

The Petitioners contend that the opinions of this Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic SS Co.,* 350

U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956) and *Italia Societa Per Azioni* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 73 (1964) present a rule that will not allow the Circuit Court holding that indemnity only lies against a stevedore employer when the actions of his employee are within the scope of employment.

It should suffice to point out that in neither of these two cases the matter now raised by Petitioners was even anticipated, less to say that it was in any way settled.

Both in *Ryan*, 350 U.S. at 126, and in *Italia*, 376 U.S. at 317 the longshoreman was engaged in stevedoring operations. What is clear in both cases is that any breach of the stevedore's warranty must be based upon an agreement between the shipowner and stevedore, see *Italia*, 376 U.S. at 321.

In their citation of *Italia* at page 5 of their brief, Petitioners failed to include the phrase that has been found, even by the Second Circuit, See *Hurdich* v. *Eastmount Shipping Co.*, 503 F.2d 397 (2d Cir. 1974), to be the key to the adjudication of the indemnity action

> "For they illustrate (the considerations) that liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury."

This has come to be known as the *Italia* balancing of interest test.

Petitioners' contention is erroneously premised on the argument that the Circuit Court is injecting a concept of tort law when it requires that the negligence of the longshoreman be in the scope of his employment. This is not so, the doctrine of implied warranty is limited to the contract and only the negligence of the longshoreman that can

constitute in itself a breach of the contractor's warranty of workmanlike performance may be imputed to his employer, *Casbon* v. *Waterman*, 274 F. Supp. 481 (E.D. La., 1967), *Affr.* 417 F.2d 1040 (5 Cir. 1969); See *Morris, Maritime Personal Injuries*, V. 2, 3 Ed., 1975, Sec. 328, p. 111, and cases cited in Note 40. See also Circuit Court Opinion 514 F.2d at 1218 and 1221.

The opinion of the Circuit Court is not in conflict with any opinion of any other Circuit

The Petitioners further argue that a certiorari should be issued because there is a conflict between the positions of the Circuit Courts with relation to what has been called the *per se* and the *factor* approach. The Petitioners contend that this Court should select the *per se* approach, most prominently expounded by the decisions of the Second Circuit cited by Petitioners. A review of the cases decided by all the Circuits will show that the comparative negligence of the longshoreman, committed while engaged in operational activities, will be imputed to his employer. The difference between so-called *per se* approach and the *factor* approach is one of only procedural importance.

It must be also noted *R. A. Martinez* v. *Compagnie General Transatlantique*, 517 F.2d 371 at 375-376 (1st Cir. 1975), where the First Circuit Court has clearly expressed the rule to be that:

> "A stevedore's warranty of workmanlike performance encompasses a promise to provide longshoremen free of negligence . . . . . ." Carillo v. Sameit Westbulk, 514 F.2d 1214 (1st Cir. 1975). In light of that well-settled rule it is difficult to argue that a stevedore has not breached its warranty where it turns out that one of its employees was negligent within the scope of his

> employment. We believe the correct rule is that the plaintiff longshoreman's negligence must be imputed to his employer as a basis for indemnity. Of course, this does not mean that a finding of contributory negligence automatically establishes the shipowner's right to indemnity. The fact finder may still find that there was conduct by the shipowner sufficient to preclude indemnity. See generally Hurdich v. Eastmount Shipping Co., 503 F.2d 397 (2d Cir. 1974)."

A review of the *Hurdich* decision by the Second Circuit at pp. 400-402 can only lead us to the conclusion that there is no actual substantive difference between the approaches.

The First Circuit has been the only faced with the necessity of deciding if the negligence of the longshoreman to be imputed to his employer was that incurred in the course of his work, or within the scope of his employment. The position of that Circuit is clear and is not in conflict with any other Circuit or with any applicable decision of this Court.

No error was committed by rejecting Petitioners improper and over-broad request for charges

The Petitioners further compounded their argument by stating that it was error to deny their charges, as previously stated the Petitioners failed to adequately preserve this objection and it was already considered and rejected by both courts below after a review of the evidence presented and an analysis of the posture in which the parties presented their respective cases for adjudication. See District Court Opinion 385 F. Supp. at 124-125 and Circuit Court's 514 F.2d at 1218-1219.

The Petitioners failed to comply with their burden of proof and may not challenge the jury verdict denying indemnity

The Petitioners allege that respondent should have been burdened with the necessity of showing that the decedent's negligence occurred outside the scope of his employment. None of the cases cited in support of that proposition at page 11 of the petition are applicable. And furthermore, the petitioners apparently forget what they argued to the trial court. All the parties and both courts below agree that once the order to stop work was given and longshoremen were ordered to leave the vessel, Alejandro Cerrich was not acting in any way within the scope of his employment.

The Petitioners admitted that after the longshoremen left, the vessel and Alejandro Cerrich stayed behind, he "was not anymore in the service of the vessel." This is only obvious for he "was no longer engaged in stevedoring services." We do not know what actions or omissions were found by the jury to amount to a comparative negligence by the deceased. But the jury could have found from the evidence presented that Mr. Cerrich was negligent in trying to leave the darkened hold and that in this effort he fell to his death, no other possibility seems reasonable from the evidence presented.

After the longshoremen were ordered to stop work, they, according to Petitioners' own expert, "flow" out of the vessel at their own pace and there is no responsibility for counting the men as they leave, this was clearly established by the stevedoring experts that appeared for all parties. If the theory suggested by the Petitioners was correct, that the deceased remained behind to unlawfully appropriate articles from the cargo, then with more reason we can argue that his activities were beyond the scope of

his employment and his negligence cannot be imputed to the respondent, for not even a remote interest on part of the longshoreman to serve his master can be implied. There was no need for the respondent to present any further evidence, the Petitioners, then third-party plaintiffs admitted that any negligence by the deceased longshoreman most probable than not occurred as a result of acts or omissions unrelated to his employment.

II. Petitioners' Own Acts and Omissions Were the Proximate Producing Cause of the Occurrence; and They Are Barred From Requesting Indemnity From the Respondent.

The shipowner's action for indemnity is not founded upon a tort or upon any duty which the stevedore owes to its employees. The action must be based upon any breach by the stevedore of its obligation to perform its services in a reasonably safe manner, see *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic Steamship Corp.,* 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956); *Weyerhauser Steamship Co.* v. *Nacinera Operating Co., Inc.,* 355 U.S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491 (1957). The evidence presented during trial clearly showed that the respondent performed its stevedoring operations in a safe and workmanlike manner, and so the jury found, but assuming for argument that some action by the stevedore, prior to his men leaving the vessel the day of the occurrence, including the imputation of decedents' own negligence under the assumption that it was on the scope of his employment, could be taken as a breach of his warranty to the shipowner then we respectfully submit that the shipowner is barred due to its own negligent acts and omissions, from obtaining any indemnity over the stevedore in this case.

If the respondent had rendered a substandard performance, which it did not, the petitioners would have been entitled to indemnity, "absent conduct on its part sufficient to preclude recovery." *Weyerhauser Steamship Co.* v. *Nacinera Operating Co., supra.* The question is therefore, who brought the unseaworthiness into play. *Old Dominion Corp.* v. *Polskie Linie Oceaniczne,* 386 F.2d 193 (4th Cir. 1967).

Plaintiffs showed that the holds of the M/S Westbulk, after their hatches were mechanically closed by the crew were unseaworthy, for lack of light and ventilation. The experts also established that the Appellants had a duty to inspect the hold before closing the hatches.

The Petitioners were in a better position than the respondent to avoid the accident; as a matter of fact only the shipowners by making an inspection before closing the hatches could have avoided the accident. Liability should fall upon the party that is best situated to adopt preventive measures and thereby reduce the likelihood of injury. The shipowners are liable, where, as here, the proximate cause of Mr. Alejandro Cerrich's death was the closing of the hatches without making an inspection. Caribe Shipping, the stevedore, was powerless to minimize the risk, the shipowners were not. *Italia, supra,* at 376 U.S. 324; *Ryan Stevedoring* v. *Pan-Atlantic Steamship Corp., supra; Southern Stevedoring & Contracting Co.* v. *Hellenic Lines Ltd.,* 388 F.2d 267 (5th Cir. 1968); *Cia. Maritima Del Nervion* v. *Flanagan Ship Corp.,* 308 F.2d 125 (5th Cir. 1962); *Waterman S/S Corp.* v. *Davis,* 353 F.2d 650 (5th Cir. 1965); *cert. den.,* 384 U.S. 972 (1965).

Based on the facts of this case, the shipowners would have been precluded by their own negligent actions and omissions from obtaining indemnity from the stevedoring contractor, even if the latter had in some way rendered a substandard performance. The jury properly found that the shipowners had been negligent and dismissed the

third-party complaint. The verdict is justified by a clear preponderance of the evidence and the judgment notwithstanding the verdict requested by shipowner should be denied, affirming the District Court on its finding to that effect.

III. THE SEVENTH AMENDMENT DEMANDED THAT THE CONTROVERSY IN THE INDEMNITY ACTION BE SUBMITTED TO THE JURY.

The decisional process to determine the question of indemnity is a balancing of responsibilities test. As stated in *Southern Stevedoring & Contracting Co.* v. *Hellenic Lines Ltd., supra,* 388 F.2d at 271:

> "The triers of facts must weigh the substantiality of the fault of the shipowner against the breach of warranty by the stevedore to determine whether the former's conduct is sufficient to preclude indemnity."

A useful decisional standard for the guidance of the courts engaged in such balancing was the one suggested by the *Italia* case, *supra,* 376 U.S. at 324:

> "Liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury."

It is a sound rule that the triers of facts be given the opportunity to perform the balancing test that is required for a just and proper adjudication of the indemnity action. *Atlantic & Gulf Stevedores, Inc.* v. *Skibs A/S Danmator,* 342 F. Supp. 837, at 845 and 846. (SD. Tx., 1971).

The court in the instant case properly submitted to the jury the issue of liability on the third-party action. The question of whether the stevedore performed his services

in a workmanlike fashion is a question for the jury, and due to the conflicting theories in this case, it could not be answered as a matter of law. The nature of the issues in the case, the factual variations in the evidence, the testimony of the foreman, of the other longshoremen, and of all the experts witnesses, all make the questions of the adequacy of the stevedore's performance of his work and of the shipowner's own conduct, a matter which was peculiarly for the jury to determine. Under the Seventh Amendment, these type of issues should be left to the jury's determination as was properly done by the Court in the instant case. *Johns* v. *N. V. Nederlandsch Amerikaansche S. M.,* 374 F.2d 189 (3rd Cir. 1967); *International Terminal* v. *N. V. Nederl. A.S.M.,* 393 U.S. 74, 89 S. Ct. 53, 21 L. Ed. 2d 58 (1968).

The matter of indemnity was properly submitted to the jury for its determination based on the conflicting theories of the parties and on the controverted issues of fact in this case. Even the Court of Appeals of the Second Circuit would have decided the issue in the same way. That circuit has decided that the issue of whether the shipowner "has been guilty of such conduct on its part as to foreclose indemnity" is essentially a question of fact and should be determined by a jury. *McNamara* v. *Weichsel Dampschepfahrts, Ag,* 293 F.2d 900 at 901-902 (2d Cir. 1961); *Hurdich* v. *Eastman Shipping Corp.,* 503 F.2d 397, at 401 and Note 3, (2d Cir. 1974); *Santiago Martinez* v. *Compagnie General Transatlantique,* 517 F.2d 371 at 376 (1st Cir. 1975).

Conclusion

Petitioners request for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be denied.

The question presented by Petitioners is of local application only to Puerto Rico and rooted on Commonwealth Statute, under Rule 19.1(b) of the Rules of this Court certiorari jurisdiction must be denied.

The issues and evidentiary matters submitted by petitioners to both courts below were properly decided after a review of the record and this Court should not enter into the same and analysis.

Respectfully submitted,

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